F
JUL 23 1971
E. ROBERT SEAVER, CLERK

APPENDIX

Supreme Court of the United States

~~OCTOBER~~ TERM, ~~1970~~ 1971

NO. ~~952~~ 70-36

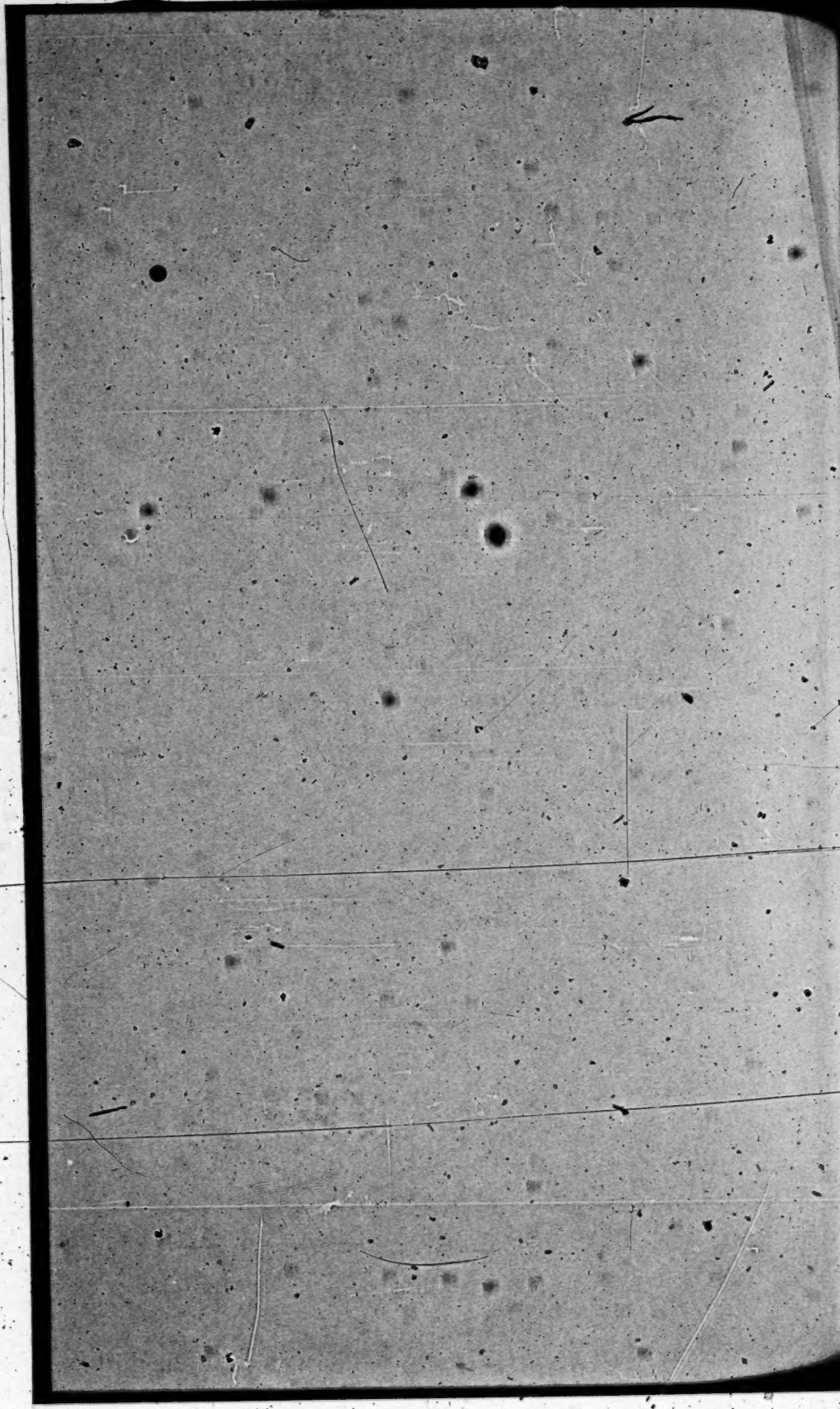
CHARLES R. PERRY, et al
PETITIONERS,

VS.

ROBERT P. SINDERMANN, Etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 9, 1970
CERTIORARI GRANTED JUNE 14, 1971



TRANSCRIPT OF RECORD
VOL.I

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

NO. 952

CHARLES R. PERRY, et al
Petitioners-Appelles,
versus
ROBERT P. SINDERMANN, for himself
and all others similarly situated,
Respondent-Appellant.

Petition for Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

INDEX

	Page
Docket Entries	i
Complaint	1
Appendix "A"	12
Appendix "B"	24
Appendix "C"	40
Appendix "D"	49
Appendix "E"	52
Appendix "F"	53
Appendix "H"	111
Appendix "I"	179
Motion for More Definite Statement	54
Motion to Strike	55

INDEX (Continued)

Docket Entries	Page
Original Answer of the Board of Regents of Odessa Junior College	57
Original Answer of the Defendant, Dr. Jack Rodgers	61
Original Answer of the Defendants, Charles R. Perry, William L. Pettit, Guy Elliott, James F. Ocker, G. Kirk Harding, R. C. Mason, Otto Pavlicek and Joe C. Zant	67
Affidavit in Support of a Motion for an Injunction	72
Order Denying Petition for Temporary Restraining Order	73
Motion to Dismiss of the Defendant Board of Regents of Odessa Junior College	74
Motion for Summary Judgment on Behalf of the Defendants, Charles R. Perry, William L. Pettit, Guy Elliott, James F. Ocker, G. Kirk Harding, R. C. Mason, Otto Pavlicek and Joe C. Zant, Individually, and Dr. Jack Rodgers, Individually and as President of Odessa Junior College	78
Affidavit in Support of a Motion Opposing Summary Judgment	85
Motion Opposing Defendant Board of Regents of Odessa Junior College's Motion to Dismiss and Brief in Support of Plaintiff's Motion	88
Note as to Omission in Record	89
Motion for Leave to Amend Pleadings	89
Note as to Omission in Record	89

INDEX (Continued)

Docket Entries	Page
Order Granting Plaintiff Leave to Amend Complaint	90
Plaintiff's First Original Amended Complaint	90
Affidavit in Support of Appendices A, B, C, D, E, F, and G of Plaintiff's First Amended Complaint	100
Note as to Omission in Record	103
Motion Opposing Defendant Board of Regents, Both Individually and Officially, and Dr. Jack Rodgers', Both Individually and in His Official Capacity, Motion for Summary Judgment and Brief in Support of Plaintiff's Motion	104
Note as to Omission in Record	106
Order Denying Defendants' Motion to Dismiss and Order Granting Defendants' Motion for Summary Judgment	106
Notice of Appeal	108
Appeal Bond	108
Note as to Omission in Record	109
Clerk's Certificate	110
Argument and Submission	184
Opinion of the Fifth Circuit Court of Appeals	185
Judgment of the Fifth Circuit Court of Appeals	197
Order Overruling Petition for Rehearing	198
Clerk's Certificate	198

DOCKET ENTRIES

A: PROCEEDINGS IN DISTRICT COURT

May 22, 1969	—Filed Complaint.
May 23, 1969	Issued Summonses and copies to U. S. Marshal, Pecos.
June 4, 1969	—Filed Summonses for all 10 Defendants, all executed 5-26-69.
June 11, 1969	—Filed Motion for More Definite Statement.
June 11, 1969	—Filed Motion to Strike.
June 11, 1969	—Filed Original Answer of the Board of Regents of Odessa Junior College.
June 11, 1969	—Filed Original Answer of Dr. Jack Rodgers.
June 11, 1969	—Filed Original Answer of Defendants Perry, Pettit, Elliott, Ocker, Kirk, Harding, Mason, Pavlicek and Zant.
July 14, 1969	—Filed Affidavit in support of Motion for an Injunction.
July 15, 1969	—Filed Order Denying Petition for Temporary Restraining Order. Parties notified by copies.
July 18, 1969	—Filed Motion to Dismiss by Defendant Board of Regents of Odessa Junior College.

July 18, 1969 —Filed Motion for Summary Judgment of Defendants Charles R. Perry et al.

July 28, 1969 —Filed Plaintiff's Affidavit in support of Motion Opposing Summary Judgment.

July 24, 1969 —Filed Plaintiff's Motion Opposing Defendants' Motion to Dismiss, with brief.

July 31, 1969 —Filed Plaintiff's Motion for Leave to Amend Pleadings.

July 31, 1969 —Filed Brief in support of Plaintiff's Motion above.

July 31, 1969 —Filed Order Granting Plaintiff Leave to Amend Complaint. Parties notified by letter.

July 31, 1969 —Filed Plaintiff's 1st Original Amended Complaint.

July 31, 1969 —Filed Appendix "G" to Complaint above.

July 31, 1969 —Filed Affidavit in support of Appendices A, B, C, D, E, F & G to Amended Complaint.

August 1, 1969 —Filed Defendants' Brief in support of their Motion for Summary Judgment.

August 1, 1969 —Filed Plaintiff's Motion opposing Defendants' Motion for Summary Judgment, with Brief in support thereof.

August 4, 1969 —Filed Order Denying Defendants' Motion to Dismiss and Order Granting Defendants' Motion for Summary Judgment.

Parties notified by copies.

August 15, 1969 —Filed Plaintiff's Notice of Appeal.

August 15, 1969 —Filed Cost Bond on Appeal.

August 15, 1969 —Filed Plaintiff-Appellant's Designation of Contents of Record on Appeal.

B: PROCEEDINGS IN UNITED STATES COURT OF APPEALS

August 10, 1970 —Opinion of United States Court of Appeals for Fifth Circuit.

September 9, 1970—Petitioner's Motion for Rehearing overruled by United States Court of Appeals for Fifth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

ROBERT P. SINDERMANN, for himself and for all others similiarly situated, Plaintiff, VS. CHARLES R. PERRY, WILLIAM L. PETTIT, GUY ELLIOTT, JAMES F. OCKER, BETTY DOOLEY, G. KIRK HARDING, R. C. MASON, OTTO PAVLICEK, JOE C. ZANT, all individually and as Members of the Board of Regents of Odessa Junior College, and DR. JACK RODGERS, Individually, and as President of Odessa Junior College, Defendants.	CIVIL ACTION Filed: May 22, 1969 NO. MO-69-CA-54

COMPLAINT

NOW COMES the Plaintiff, through his attorneys, Warren Burnett and Richard J. Clarkson, and as and for a cause of action, on behalf of himself and on behalf of all who are similarly situated, and against the Defendants, alleges the following:

I.

That this Court has jurisdiction in this cause over all parties under 42 U.S.C., Sec. 1983, and 28 U.S.C., Sec. 1343.

II.

That the Plaintiff, ROBERT P. SINDERMANN, is a citizen of the United States and a resident of Odessa, Ector County, Texas.

III.

That the Defendants, CHARLES R. PERRY, WILLIAM L. PETTIT, GUY ELLIOTT, JAMES F. OCKER, BETTY DOOLEY, G. KIRK HARDING, R. C. MASON, OTTO PAVLICEK, JOE C. ZANT, are citizens of the United States and residents of the City of Odessa, Ector County, Texas, and can be served with process at the following addresses:

Charles R. Perry
Peters & Field Building
800 Central Drive
Odessa, Texas

William L. Pettit
2326 Field
Odessa, Texas

Guy Elliott
2500 E. 8th Street
Odessa, Texas

James F. Ocker
2709 Fair Oaks
Odessa, Texas

Betty Dooley
2926 Chisum
Odessa, Texas

G. Kirk Harding
5003 Kingston
Odessa, Texas

R. C. Mason
1415 Emerald
Odessa, Texas

Otto Pavlicek
2318 N. Grant
Odessa, Texas

Joe C. Zant
J. C. Zant Engineering Co.
Country Club Estates
Odessa, Texas

IV.

That the Defendant, Board of Regents of Odessa Junior College, is a body corporate duly organized and existing under the general laws of the State of Texas, having the power to sue and to be sued in its corporate capacity, Vernon's Annotated Civil Statutes of Texas, Art. 2815h, Sec. 20, which governs and manages the branch of higher education in the State of Texas known as Odessa Junior College, and may be served by serving Charles R. Perry, President of said Board of Regents, at Peters and Field Building, 800 Central Drive, Odessa, Texas.

V.

That the Defendant, Dr. Jack Rodgers, is President of Odessa Junior College, which college is

located in Odessa, Texas, and that the said Dr. Jack Rodgers, by and through the authority delegated to him by the Defendant Board of Regents, directs, governs and manages the said college. Said Defendant, Jack Rodgers, may be served, both individually and in his capacity as President of said college, by process of service at his office at Odessa Junior College.

VI.

That the Plaintiff was retained by the Defendants as a lecturer to teach Government in the Department of Social Sciences at Odessa Junior College for the school year 1968-1969, and the Plaintiff performed and continued to perform those duties pursuant to such retention.

VII.

That although Odessa Junior College has no tenure system, the Administration of the College acknowledges the fact that faculty members have "permanent tenure" until the time that their contracts are not renewed. (cf. Appendix "A", page 3). That on October 16, 1967, the Coordinating Board Texas College and University System adopted guiding principles designed to aid Texas colleges and universities in evaluatng the conditions of academic freedom, tenure, and responsiblity that prevail on each campus. The Plaintiff has tenure within the guiding principles established by the Coordinating Board, being a teacher in Texas' higher education institutions for ten (10) years, with four (4) of those years being at Odessa Junior College. (Cf. Appendix "B", page 1-2).

VIII.

That the Texas Coordinating Board's statement on academic freedom, tenure and responsibility was published in the bulletin of the American Association of University Professors with that organization's approbation. (Cf. Appendix "C").

IX.

That there have been campaigns in the Permian Basin (Midland-Odessa and surrounding areas) by the local citizenry in support of bills before the Texas Legislature to either elevate Odessa Junior College to a four-year status, or else to build a separate senior college in the Permian Basin. The Plaintiff has been vocal in his expressions of opinion in support of the movement to elevate Odessa College to a four-year status, and such expressions have been in opposition to the public position taken by the Defendant Board of Regents, and Defendant, Dr. Jack Rodgers. (See Appendix "A").

X.

That in a press release issued by the office of Defendant, Jack Rodgers, on May 13, 1969, it was stated that one of the reasons for not renewing the contract of the Plaintiff was his association with the "Committee to Elevate Odessa Junior College." (See Appendix "A").

XI.

That the Plaintiff is State President of the Texas Junior College Teachers' Association, and was invited to appear in that capacity before the Texas Senate's State Affairs Committee by State Senator

Oscar Mauzy of Dallas, Texas, and the Chairman of the State Affairs Committee, William T. (Bill) Moore, on proposed academic freedom legislation. (Cf. Appendix "D").

XII.

That in a press release issued by the office of Defendant, Dr. Jack Rodgers, on May 13, 1969, that one of the reasons for the Plaintiff not being retained for the academic year 1969-1970 was his unauthorized trip to Austin, Texas, to testify without receiving the college Administration's approval. (Cf. Appendix "A").

XIII.

That those reasons for the Plaintiff's contract not being renewed as found in paragraphs X and XII above are the only ascertainable reasons for such action by the Defendants, no formal charges having been sent to the Plaintiff by said Defendants, are in nowise sufficient cause for the dismissal of a faculty member with tenure as established by the Coordinating Board Texas College and University System, in its statement of October 16, 1967, namely:

> "Professional incompetence, moral turpitude, or gross neglet of professional responsibilities." (Cf. Appendix "B", page 2).

XIV.

That ten members of the faculty of the Social Science Department of Odessa Junior College signed a statement attesting to the fact that the Plaintiff is a totally competent person professionally, and that nothing he has said or done has, in any way, dero-

gated from his competence in the classroom as a lecturer in Government at the college. This is all but a few members of his Department. (Cf. Appendix "E").

XV.

That the Plaintiff was advised on May 19, 1969, by the Defendant, Dr. Jack Rodgers, purporting to act under due authority, that his contract would not be renewed for the year 1969-1970. (Cf. Appendix "F").

XVI.

That the Defendants, or their agents, refused to give any reasons to the Plaintiff for their decision to not retain him as a member of Odessa Junior College faculty for the school year 1969-1970, and also that the Defendants did not offer the Plaintiff an impartial hearing into the merits of such decision.

XVII.

That the reason for such decision by the Defendants, or their agents, was to retaliate against the Plaintiff for the Plaintiff's expression of opinion.

XVIII.

That the Defendant's decision not to retain the Plaintiff was not based upon good faith on their part.

XIX.

That the decision of the Defendants is a denial, a violation, a restraint, and a deprivation of the Plaintiff's right to free speech under the United States Constitution.

XX.

That the decision of the Defendants was not made under ascertainable and definite standards governing the Defendants in making this decision.

XXI.

That the Defendants, or their agents, have intimidated and harassed the Plaintiff and other Odessa Junior College faculty members similarly situated because the Plaintiff and those so situated have exercised their right to free speech in a way critical of the Defendants.

XXII.

That the conduct of the Defendants as described above in this Complaint has made the Plaintiff and those Odessa Junior College faculty members similarly situated reluctant and fearful to express their opinions.

XXIII.

That such decision of the Defendants has caused, and unless such decision is restrained from enforcement, will cause the Plaintiff damages to his professional reputation and standing for which there is no adequate remedy at law.

XXIV.

That such decision of the Defendants has already caused the Plaintiff to suffer actual damges to his reputation, to his ability to obtain similar employment in other colleges in the State of Texas, damages in the amount of Two Hundred Seventy-Five Thousand Dollars ($275,000.00).

XXV.

That such decision of the Defendants was retaliatory in nature and not based upon good faith, and that they, therefore, should be liable for punitive damages in the amount of Two Hundred Thousand Dollars ($200,000.00).

XXVI.

That because the actions of the Defendants necissitated that the Plaintiff retain attorneys in order to obtain his United States Constitutional rights, the Defendants should be held liable for reasonable attorneys' fees.

XXVII.

That the Plaintiff brings this action on behalf of himself, on behalf of many of the Odessa Junior College faculty members too numerous to join herein, who have been intimidated and harassed by the Defendants, or their agents, for expressing their opinions, and on behalf of many Odessa Junior College faculty members too numerous to join herein, who have become fearful and reluctant to express their opinions because of the conduct of the Defendants as described herein.

WHEREFORE, the Plaintiff demands the following relief:

(1) A judgment that the decision of the Defendants that the plaintiff not be retained as a member of the Odessa Junior College faculty for the school year 1969-1970, is in violation of the Plaintiff's rights, and in violaton of the rights of those similarly situated, under the First and Fourteenth Amendments to the United States Constitution.

(2) That the Defendants are to grant to the Plaintiff a hearing on the reasons for his dismissal in substantial compliance with the recommendations set out by the Coordinating Board, Texas College and University System as contained in the attached Appendix "B", namely: The Defendants should give formally written charges to the Plaintiff. Presentation of such charges should provide for (a) a written response to the charges by the faculty member, if he wishes a hearing; (b) opportunity by the faculty member to exercise his right to be represented by counsel of his own choosing, to have a hearing before a regularly elected faculty committee, to confront and cross-examine witnesses, to know the name and statement of a witness who, for extraordinary reasons, does not appear at the hearing, to respond orally to charges made against him, to have findings and recommendations made on each of the charges, and to be given a complete transcript of the hearing, including the findings of the faculty committee; (c) a review of the case, if essential, by an appropriate reviewing body — the review to include the findings and recommendations of the hearing committee, the opportunity of the faculty member and University representative for oral argument, the return of the proceeding to the hearing committee, if the original recommendations are not sustained, the study of the hearing committee's reconsidered findings and recommendations, and a rendering of a final decision (which should be written in the rare case in which the hearing committee is overruled).

(3) A judgment that the failure of the Defendants to prove the Plaintiff with an impartial hearing as to the merits of their decision of May 6, 1969, was arbitrary, capricious, and contrary to the Plaintiff's

rights, and the rights of those similarly situated, under the First, Fifth and Fourteenth Amendments to the United States Constitution.

(4) A judgment that the refusal of the Defendants to give reasons for their decision was arbitrary, capricious, and in violation of the rights of Plaintiff and those similarly situated, under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

(5) A judgment that the failure of the Defendants to make such decision under ascertainable and finite standards was arbitrary, capricious, and in violation of the rights of Plaintiff and those similarly situated, under the First, Fifth and Fourteenth Amendments to the United States Constitution.

(6) An order of the Court directing the Defendants to retain the Plaintiff in his position as a member of the Odessa Junior College faculty for the year 1969-1970, at the same level of responsibility and function as per the retention for the school year 1968-1969.

(7) That a date be set on the court's docket for a trial on the damages alleged in this complaint, and

(8) for such other and further relief as may be equitable.

LAW OFFICES OF WARREN BURNETT
P. O. Box 3707 - Odessa, Texas

By: s/Richard J. Clarkson
Richard J. Clarkson

ATTORNEYS FOR THE PLAINTIFF

PLAINTIFF DEMANDS TRIAL BY JURY.

APPENDIX "A"

Mr. Robert P. Sindermann became a member of the Odessa College Faculty in September, 1965. He previously had taught at San Antonio College, San Antonio, Texas. Mr. Sindermann had completed most of his course work for the Doctorate in Government at the University of Texas. At the suggestion of the President of the College, Mr. Sindermann was made "co-chairman" of the Social Science Department, with an increase in pay of $300.00 per year.

As soon as Mr. Sindermann became co-chairman, he immediately began "circularizing" members of his department with lengthy letters. Unfortunately, none of these lengthy letters have been retained in his personnel file.

Because of his "addiction" to letterwriting, and because of his apparent unwillingness to accomodate himself to procedures of "lines of authority" and "administrative authority," he was dropped as co-chairman of the Department in the fall of 1968.

When Mr. Sindermann was made co-chairman his salary was increased $300.00 per year. When this title and authority were dropped, his salary was not reduced by this amount.

At the Annual Convention of the Texas Junior College Teachers Association in February, 1969, in Fort Worth, Mr. Sindermann was elected President of this Association, after the nominee for President resigned.

(See letter of congratulations and reply of February 17)

Mr. Sindermann accepted this office without consultation with any administrative officer of Odessa College. This was within his rights to do so, but had he had the foresight to consult with the administration of Odessa College, many of the subsequent problems which _____ could have been prevented. Two faculty members of Odessa College had previously served as President of this Organization, and with distinction, and with cooperation from the administration in carrying out their duties.

Mr. Sindermann immediately, after his election, requested student clerical help amounting to a full-time secretary, as well as requesting that his teaching load be reduced by one class. These requests were refused. Previous Presidents of the Association had asked for a minimum of clerical help, which had been approved at College expense. Neither had asked for a reduction of class load.

The members of the faculty, who had served as President in previous years, had used the summer months for visiting the various Texas junior colleges. Mr. Sindermann asked for time off during the winter months to accomplish this. His request was refused and it was suggested to him that he follow the pattern set by his predecessors from Odessa College.

Unfortunately, Odessa College has been the object of "politics" in recent months through the efforts of various people to secure the elevation of Odessa College to four year status. Because (1) The Governor's Committee for the Study of Higher Education recommended that no other junior colleges be elevated to senior college status, (2) The Coordinating Board for Higher Education recommended the same, and

(3) In the Master Plan for Higher Education in Texas, the Coordinating Board recommended the establishment of an upper-level institution in the Odessa-Midland area, the Board of Regents of Odessa College saw fit to approve the guidelines of the Coordinating Board and approved the Annexation of the Midland Independent School District to the Odessa Junior College District.

This action, opposed by one member of the College Board of Regents, led to the establishment of a group calling itself "The Committee to Keep Odessa College in Odessa," later known as "The Committee to Elevate Odessa College."

Mr. Sindermann saw fit to align himself with this group, in contradiction to a policy statement of the Board of Regents in the matter. He permitted himself to be called to testify before the Board of Regents as an "expert" on Technical and Vocational Education, and on February 28, addressed a letter to the President of the College with regard to the elevation of Odessa College.

(See letter of February 28.)

He later testified as an "expert" at the hearing of H.B. 157, criticizing decisions of the Coordinating Board, and "reading" into the record a statement of a former Odessa College faculty member. This person had attained a record of failure in administration.

In September of 1968, the Board of Regents adopted a statement on Academic Freedom (see attachment) in line with that suggested by the Coordinating Board which had adopted its suggestion from

that proposed by the American Association of University Professors. The Board postponed until the fall of 1969 any consideration of a statement on Tenure, relying on the statement used for many years in the **Faculty Guide,** which reads as follows:

> **"Teacher Tenure:** Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

In the heat of the dissension on the elevation of Odessa College, as opposed to the recommendation of the Coordinating Board for an upper-level college, a rather disgusting ad was run, to which Mr. Sindermann's name was attached, in the local newspaper. This ad ridiculed the position taken by the Board of Regents of Odessa College, contrary to the provisions of the statement of Academic Freedom previously adopted by the Board.

(See copy of ad.)

While Mr. Sindermann submitted a letter of "disclaimer" to the President of the Board of Regents, his "guilt by association" cannot be refuted, because he had acted with this group, opposed to a stated position of the Board of Regents.

In an undated letter from Delton Goodin, Chairman of the Legislative Committee of the Texas Junior College Teachers' Association, Mr. Sindermann

was informed of a hearing on S.B. 512, a bill on Academic Freedom and Tenure.

(See attached letter.)

On April 9, Mr. Sindermann sent a letter to Mr. Bernhard T. Sedate, Dean of the Evening College and Chairman of the Social Science Department, enclosing a copy of Mr. Goodin's letter and requesting permission to absent himself from the campus to testify on SB 512.

The **Faculty Guide of Odessa College,** page 53, contains the following statement:

> "Arrangements for absences with full pay shall be made in advance by the employee. Approval for absence because of personal or family illness shall be granted by the departmental chairman and the Dean of the College. Approval of absence for other causes shall be obtained from the Dean of the College and subject to final approval by the President."

The letter addressed to the Chairman was submitted to the Dean of the College. In line with the regulation of absences contained in the **Faculty Guide,** the letter was, in turn, submitted to the President of the College.

The request to be absent was denied by the President, based on the following reasoning:

(1). Mr. Sindermann was employed as a full-time faculty member to teach students. He can make this contribution to Odessa College only by being present to teach.

(2). The organization of which Mr. Sindermann is President, the Texas Junior College Teachers' Association, has a Legislative Committee Chairman, Mr. Delton Goodin, and it is this person who should have represented the organization if it were to be represented. The President of an organization can not perform all the duties of his officers, and he should not attempt to do so.

(3). The Junior College Teachers' Association has not endorsed S.B. 512.

(See copy of attached resolutions approved at the February meeting.)

(4). The Coordinating Board has suggested the adoption of statements on Academic Freedom and Tenure by college boards of regents. Only a few junior colleges, of which Odessa College is one, have adopted a statement on Academic Freedom. As already mentioned, consideration of a statement on Tenure has been postponed. This prior action of the Board should indicate an interest on the part of the Board in faculty "rights."

A letter denying this request was sent to Mr. Sindermann by Dean Chisum on April 10.

(See attached letter.)

Let it be said at this time that Mr. Sindermann's relationship to the Committee to Elevate Odessa College has never been called to his attention. His violation of the statement on Academic Freedom, wherein his name appeared on an ad which ridiculed actions of the Board of Regents, has never been called to his attention. This should indicate the "tolerance"

of the administration and of the Board to Mr. Sindermann's actions in opposing a "policy" statement of the Board, and of recognition of "rights" of a Faculty Member.

A letter to Mr. Sindermann, dated April 16, from Senator Oscar H. Mauzy, acknowledged receipt of Mr. Sindermann's letter of April 9, and expressed hope that Mr. Sindermann could be present for the hearing on S.B. 512 on April 23 before the State Affairs Committee.

(See letter of April 16 from Senator Mauzy.)

Unfortunately, Mr. Sindermann has not supplied a copy of his letter to Senator Mauzy.

A letter from Senator William T. (Bill) Moore, dated April 16, also acknowledges receipt of Mr. Sindermann's letter, and invites him to appear for a hearing on S.B. 512.

Again, unfortunately, Mr. Sindermann has not supplied a copy of his letter to Senator Moore.

On April 19, Mr. Sindermann wrote a letter to Dean Chisum asking for an opportunity to discuss the refusal contained in the letter of April 10. On April 21, Mr. Sindermann called Dean Chisum's office and the Secretary referred him to the President of the College.

On the afternoon of April 22, Mr. Sindermann came to the office of the President. After discussion of the problem, the President enumerated items (1),

(2), (3), and (4) listed above as reasons for disapproval of the absence and approval was refused by the President.

On the same day, April 22, apparently after talking with the President, Mr. Sindermann wrote a letter to Dean Chisum indicating that he would be absent on April 23, which he was, and his classes were taught by substitutes. The hearing on S.B. 512, however, was not held on April 23.

(See letter of April 22.)

On Saturday, April 26, a four page letter, dated April 25, to the "Chairman of the Social Science Department", Mr. Sedate, was received from Mr. Sindermann. The letter requested that substitutes be secured for Mr. Sindermann "while I am in Austin on official T.J.C.T.A. business," to testify for S.B. 512 and S.B. 531 (Snelson's Upper Level College Bill) (See letter of April 25.)

The above letter was referred to Dean Chisum and the President of the College, who were in conference at the time. Mr. Sedate was instructed to attempt to contact Mr. Sindermann and verbally refuse permission for the absence. He was also asked to type a letter denying permission and deliver it to Mr. Sindermann. Mr. Sedate could make no personal contact with Mr. Sindermann but did deliver the letter to Mr. Sindermann's home.

A letter dated April 27 from Mr. Sindermann to

Mr. Sedate indicated that Mr. Sindermann would be absent from classes on April 28 to testify on S.B. 512. S.B. 512 was not heard on April 28 and Mr. Sindermann appeared on the hearing for S.B. 531.

(See letter of April 27.)

A mimeographed letter, dated May 6, published by Mr. Sindermann indicated that S.B. 512 had been "put in deep freeze" by the Senate State Affairs Committee and urged the Faculty of Odessa College to write and wire Legislators to help "jar it out of Committee."

On May 6, an Executive Session of the Board of Regents of Odessa College was held to approve renewal of contracts. The case of Mr. Sindermann was discussed. The Board was given the information above, as well as informed of the opinion of the College Attorney as to the law regarding contracts in junior colleges (See attached opinion dated April 28).

The resolution passed by the Board was as follows: "Moved by Elliott, seconded by Harding, that the Board accept the approved recommendations of Dr. Rodgers for renewal of contracts."

While the Board expressed disapproval of Mr. Sindermann's actions, the resolution does not specify non-renewal of a contract for Mr. Sindermann.

On May 9, a telegram was received from Senator Oscar H. Mauzy by the President asking for Mr.

Sindermann to testify on S.B. 512 at 2:00 P.M. on May 19. No reply was given to this telegram because of the distant date of the hearing.

Also, on May 9, a letter from Mr. Sindermann to the President, asking a "prompt" answer, inquired about his contract, and asking for a reply by 3:00 P.M. The letter enclosed a statement on "Standards for Notice of Non-reappointment" issued by the American Association of University Professors. This, essentially, is the statement of tenure on which the Board of Regents has postponed action until September of 1969.

(See letter of May 9.)

The President of the College made no reply to this letter because no contracts have been issued to any faculty member. It was not considered necessary to reply to this letter because Mr. Sindermann is one of 106 full-time faculty members and is entitled to no more consideration than the other 105 members.

On May 9, apparently after receiving no reply from his letter, Mr. Sindermann addressed the following letter to the President:

> "I have to leave town now, and will be staying at the Adolphus Hotel, Dallas, tonight and tomorrow. If I am having my contract renewed for next year, you can save all of us a great deal of trouble by so notifying me, promptly."

Also on May 9, a letter to Mr. Sedate requested

permission to be absent on May 19, was received from Mr. Sindermann. This letter was accompanied by a telegram from Senator Mauzy to Mr. Sindermann requesting his presence on May 19.

(See letter and telegram of May 19.)

Both Dean Chisum and the President were absent from Odessa in late afternoon of May 9. Mr. Sedate replied negatively, in the absence of the Dean and President, to the effect that, in view of precedent of two refusals in the past, he had no recourse except to disapprove the request.

(See letter of May 9.)

On May 11, telegrams from Mr. Sindermann were sent to the President, the Dean, and Mr. Sedate from Dallas, stating:

> "Mistake in earlier telegram from Senator Mauzy, S.B. 512 will actually be heard Monday, May 12, in Austin at 2 P.M. Request permission to attend hearing. Please reply my home address Sunday."

Mr. Sedate reported to the President that, in his absence, he had told Mr. Sindermann that his telegram request had been denied.

To this date, no official correction of the date of hearing on S.B. 512 has been received by members of the administrative staff of Odessa College.

On Monday, May 12, the President of Odessa College received information from a local newspaper

reporter that Mr. Sindermann had wired Senator Mauzy the following information, if not in the exact language, since a copy of the telegram has not been presented to the President of the College:

> "I have been fired from Odessa College for attempting to testify on S.B. 512. All the more reason for action on this bill. Advise elimination of Odessa College from a line item appropriation in the appropriation bill."

As of this date no contracts have been renewed for faculty members. Mr. Sindermann has not been notified officially that his contract will not be renewed.

APPENDIX "B"

cb policy paper 1

COORDINATING BOARD
TEXAS COLLEGE AND UNIVERSITY SYSTEM

• Academic Freedom,

• Tenure, and

• Responsibility

for Faculty Members in Texas Public Colleges and Universities

Adopted: October 16, 1967

• Academic Freedom,

• Tenure, and

• Responsibility

for Faculty Members in Texas Public Colleges and Universities

Adopted: October 16, 1967

ACADEMIC FREEDOM, TENURE, AND RESPONSIBILITY FOR FACULTY MEMBERS IN TEXAS PUBLIC COLLEGES AND UNIVERSITIES

The statement which follows, issued in response to Section 14, Paragraph 2, of House Bill 1, 59th Texas Legislature, provides guiding principles designed to aid Texas colleges and universities in evaluating the conditions of academic freedom, tenure, and responsibility that prevail on each campus.

I

Academic Freedom

Institutions of higher education are conducted for the common good. The common good depends upon a free search for truth and its free expression. Hence, it is essential that the faculty member be free to pursue scholarly inquiry without undue restriction, and to voice and publish his conclusions concerning the significance of evidence that he considers relevant. He must be free from the corrosive fear that others, inside or outside the university community, because their vision may differ from his own, may threaten his professional career or the material benefits accruing from it.

Each faculty member is entitled to full freedom in the classroom in discussing the subject which he teaches. Each faculty member is also a citizen of his nation, state and community; and when he speaks, writes or acts as such, must be free from institutional censorship or discipline.

II

Academic Responsibility

The concept of academic freedom must be accompanied by an equally demanding concept of responsibility, shared by governing boards, administrators, and faculty members.

The essential responsibilities of governing boards and administrators are set forth in the **Standards for Colleges,** adopted by the Southern Association of Colleges and Schools, as updated and revised.

The fundamental responsibilities of a faculty member as a teacher and scholar include a maintenance of competence in his field of specialization and the exhibition of such competence in lectures, discussions or publications.

Exercise of professional integrity by a faculty member includes recognition that the public will judge his profession and his institution by his statements. Therefore, he should strive to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to avoid creating the impression that he speaks or acts for his college or university when he speaks or acts as a private person.

A faculty member should be judicious in the use of controversial material in the classroom and should introduce such material only as it has clear relationship to his subject field.

A faculty member has the responsibility to provide

due notice of his intention to interrupt or terminate institutional services.

III

Tenure Policy

A. Tenure

Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.

A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:

(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years, (even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years).

(2) Notice of nonreappointment, or of intention not to reappoint a faculty member, should be given in writing in accord with the following standards: (a) Not later than March 1 of the first academic year of probationary service, if the appointment ex-

pires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination; (b) not later than December 15 of the second year of probationary service, if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination; (c) at least twelve months before the expiration of a probationary appointment after two or more years in the institution.

(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities.

Cases of **bona fide** financial emergency, or the phasing out of institutional programs requiring reduction of faculty, may permit exceptions of tenure regulations in unusual circumstances.

B. Faculty Dismissals

Proper dismissal procedures, established in anticipation of their being needed, are essential to an effective tenure system. In the Texas public college and university system, these procedures should have the following components:

(1) These dismissal procedures apply to a faculty member who has tenure, or whose term appointment has not expired, or who alleges a **prima facie** case of a violation of academic freedom in the non-renewal of his contract. If he **has** tenure or an unexpired appointment extending beyond the period of the proposed dismissal, the burden of proof is upon the administration to show adequate cause why he should

be dismissed. If he does **not** have tenure, but contends that the non-renewal of his contract constitutes a violation of his academic freedom, the burden of proof is upon the faculty member. If a faculty member on probationary appointment alleges that the non-renewal of his contract constitutes a violation of academic freedom, he may request that his allegations be given preliminary consideration by a faculty committee. The committee shall then recommend whether a hearing is warranted.

(2) The institution's procedure in dismissal cases described in (1) above should include, first, a **bona fide** effort to achieve a satisfactory resolution of difficulties through preliminary inquiry, discussion, or confidential mediation.

Should these efforts fail, presentation of reasonably detailed and formally written charges should be made to the concerned faculty member. Presentation of such charges shall provide for (a) a written response to the charges by the faculty member, if he wishes a hearing; (b) opportunity by the faculty member to exercise his right to be represented by counsel of his choosing, to have a hearing before a regular elected faculty committee, to confront and cross-examine witnesses, to know the name and statement of a witness who for extraordinary reasons does not appear at the hearing, to respond orally to charges made against him, to have findings and recommendations made on each of the charges, and to be given a complete transcript of the hearing, including the findings of the faculty committee; (c) a review of the case, if essential, by an appropriate reviewing body—the review to include the findings and recommendations of the hearing committee, the

opportunity of the faculty member and university representative for oral argument, the return of the proceeding to the hearing committee if the original recommendations are not sustained, the study of the hearing committee's reconsidered findings and recommendations, and the rendering of a final decision (which should be written in the rare case in which the hearing committee is overruled).

(3) If the faculty appointment is to be terminated, the faculty member, except in cases of moral turpitude, will receive his salary at least for one year or for the period of notice to which he is entitled under these regulations. He will be continued in his duties for that period unless at the discretion of the institution he be granted a leave of absence with pay.

IV

Implementation

Within one year, and with appropriate faculty participation, each public institution in Texas is expected to draft its own written statement on academic freedom, tenure, and responsibilities. The statement should be based on the guiding principles described in the preceding paragraphs, and a copy should be filed with the Coordinating Board, Texas College and University System. Each statement should detail a procedure to be followed in case of dismissal of a tenured faculty member.

APPENDIX I

Written Terms of Employment

The institution shall provide each faculty member with a statement in writing of the terms of his employment, including special conditions, responsibilities and any special prerequisites. The document

should cover such items as rank, salary, tenure provisions, whether the position is full-time or part-time, and the inclusive dates of the term of service.

APPENDIX II

Tenure, Financial Exigency, and Phasing Out Of Programs

Cases of **bona fide** financial exigency, or the phasing out of institutional programs requiring reduction of faculty, may permit exceptions to tenure regulations in unusual circumstances.

(1) Faculty members involved in such adjustments in emergency situations should be given opportunities for appointment in related areas provided (a) they are qualified professionally to teach in such areas, and (b) such positions are available.

(2) Faculty members who can present **prima facie** evidence of discriminatory treatment or infringement of academic freedom in such emergencies have the right to a fair hearing before an elected faculty committee.

(3) Any faculty member involved in such a readjustment process has the right to reappointment to his previous position if it is re-established within two calendar years.

APPENDIX III

Due Process Proceedings In Dismissal Cases and Cases Where Academic Freedom Infringement Is Alleged

Due process as set forth in this statement embodies a course of professional proceedings in line with stated rules and principles generally recognized in

the academic community. Due process carries with it the right of a tenured faculty member or a teacher with an unexpired term contract to a fair hearing before an elected committee of his peers. The procedure which follows illustrates how the principle of due process can be adapted to individual institutions.

a. **Personal Conference.** When reason arises to question the fitness of a faculty member, the appropriate administrative officers should discuss the matter with him in personal conference. The matter may be terminated by mutual consent at this point; but if an adjustment does not result, the matter should be taken up by an advisory committee.

b. **Advisory Committee.** The advisory committee should be a standing committee elected by the faculty or an appropriate organized faculty organization, appointed by the President of the Faculty Senate or other elected faculty representative body, or appointed by the chief executive officer of the institution from a faculty elected panel. The committee's proceedings may be informal and flexible. It should make such inquiry as it deems necessary, offer confidential advice to the faculty member and the administration, and attempt to effect an adjustment. If none is effected, the advisory committee or the chief executive officer may recommend a hearing. If a hearing is to be held, the chief executive officer should formulate a statement of the grounds for dismissal, giving due regard to the advisory committee's report. These grounds should be reasonably detailed.

c. **Hearing Committee.** The hearing committee should be an elected standing committee, or a standing or **ad hoc** committee appointed as noted in the paragraph above, not overlapping in membership with the advisory committee. The hearing committee

should include only teaching faculty members of tenure status, and each member should be subject to challenge for cause.

If a hearing is recommended, the chief executive officer should send a letter to the faculty member informing him of the grounds for dismissal proceedings, and informing him that, should he so request, a hearing to determine whether he should be removed from his faculty position will be conducted by the hearing committee at a specified time and place. The chief executive officer's letter should inform the faculty member of the procedural rights which will be accorded to him in the hearing. These should include an advisor of his own choosing to act as counsel; a full stenographic record of the proceedings, a transcript of which is to be made available to him and to the President; the right to question witnesses; the opportunity to be confronted by all witnesses adverse to him; and, if a witness cannot appear, the right to the name and statement of the witness.

If the faculty member desires a hearing, he should write to the institution's chief executive officer within a reasonable period, in response to the statements given as grounds for his dismissal.

Suspension of the faculty member from his usual duties during the proceedings involving him is justified only if his welfare or that of the institution or its students is threatened by his continuance. Any such suspension should be with pay and with appropriate provisions for useful duties whenever possible.

In deliberating, the committee should allow oral arguments or written briefs by the chief executive officer or his representative, and by the faculty mem-

ber or his representative. The committee should make explicit findings with respect to each of the grounds of removal presented and should recommend whether there is adequate cause for dismissal. The committee's recommendation should be conveyed in writing to the chief executive officer and to the faculty member.

Governing Board. If the faculty member's appointment is proposed to be terminated, the chief executive officer should transmit the full report of the hearing committee to the institution's Governing Board. If the Governing Board chooses to review the case, its review should be based on the record of the previous hearing, accompanied by opportunity for argument by the principals or their representatives. The decision of the hearing committee should either be sustained or the proceedings be returned to the chief executive officer and to the committee with objections specified. In such case, the committee should reconsider, taking account of the stated objections and receiving new evidence if necessary. It should frame its reconsidered recommendation and communicate it in the same manner as before. Only after study of the committee's reconsideration should the Governing Board render a written decision overruling the committee.

Publicity. The proceedings of the hearing committee should be confined to the principles, their advisers, the witnesses called by the committee, and such observers as the committee may specifically invite. Except for such brief announcements as may be required, covering the time of the hearing and related matters, public statements about the case by either the faculty member or administrative officers should

be avoided so far as possible until the proceedings have been completed. Announcement of a final decision should include a statement of the hearing committee's original action, if this has not previously been made known.

APPENDIX IV

Recruitment and Resignation Of Faculty Members

Sound procedures regarding the recruitment and resignation of faculty members are essential for the proper functioning of colleges and universities. The following nationally recognized statement is recommended for both administrations and faculty members in Texas State colleges and universities.

* * *

Mobility of faculty members among colleges and universities is rightly recognized as desirable in American higher education. Yet the departure of a faculty member always requires changes within his institution, and may entail major adjustments on the part of his colleagues, the administration, and students in his field. Ordinarily a temporary or permanent successor must be found and appointed to either his position or the position of a colleague who is promoted to replace him.

In a period of expansion of higher education, such as that already existing and promising to be even more intensified as a pattern for the coming years, adjustments are required more frequently as the

number of positions and of transfers among institutions increases. These become more difficult than at other times, especially in the higher academic ranks. Clear standards of practice in the recruitment and in the resignations of members of existing faculties should contribute to an orderly interchange of personnel that will be in the interest of all.

The standards set forth below are recommended to administrations and faculties, in the belief that they are sound and should be generally followed. They are predicated on the assumption that proper provision has been made by employing institutions for timely notice to probationary faculty members and those on term appointments, with respect to their subsequent status. In addition to observing applicable requirements for notice of termination to probatonary faculty members, institutions should make provision for notice to all faculty members not later than March 15 of each year of their status the following fall, including rank and (unless unavoidable budget procedures beyond the institution forbid) prospective salary.

1. Negotiations looking to the possible appointment for the following fall of persons who are already faculty members of other institutions, in active service or on leave-of-absence and not on terminal appointment, should be begun and completed as early as possible in the academic year. It is desirable that, when feasible, the faculty member who has been approached with regard to another position inform the

appropriate officers of his institution when such negotiations are in progress. The conclusion of a binding agreement for the faculty member to accept an appointment elsewhere should always be followed by prompt notice to his institution.

2. A faculty member should not resign in order to accept other employment as of the end of the academic year, later than May 15 or 30 days after receiving notification of the terms of his continued employment the following year, whichever date occurs later. It is recognized, however, that this obligation will be in effect only if institutions generally observe the time factor set forth in the following paragraph for new offers. It is also recognized that emergencies will occur. In such an emergency the faculty member may ask the appropriate officials of his institution to waive this requirement; but he should conform to their decision.

3. To permit a faculty member to give due consideration and timely notice to his institution in the circumstances defined in paragraph 1 of these standards, an offer of appointment for the following fall at another institution should not be made after May 1. The offer should be a "firm" one, not subject to contingencies.

4. Institutions deprived of services of faculty members too late in the academic year to permit their replacement by securing the members of other faculties in conformity to these standards, and institutions otherwise prevented from taking timely action to

recruit from other faculties, should accept the necessity of making temporary arrangements or obtaining personnel from other sources, including new entrants to the academic profession and faculty personnel who have retired.

5. Except by agreement with his institution, a faculty member should not leave or be solicited to leave his position during an academic year for which he holds an appointment.

---

[1] The Statement on Recruitment and Resignation of Faculty Members, reprinted here, was adopted by the Association of American Colleges in January, 1961, with the following reservations as set forth in a preamble prepared by that Association's Commission on Academic Freedom and Tenure:

(1) No set of principles adopted by the Association can do more than suggest and recommend a course of action. Consequently, the present statement in no way interferes with institutional sovereignty.

(2) The Commission realizes that the diversity of practice and control that exists among institutions of higher learning precludes any set of standards from being universally applicable to every situation.

(3) The statement is concerned only with minimum standards and in no way seeks to create a norm for institutions at which "better" practices already are in force.

(4) The Commission recognizes the fact that "emergency" situations will arise and will have to be dealt with. However, it urges both administration and faculty to do so in ways that will not go counter to the spirit of cooperation, good faith and responsibility that the statement is seeking to promote.

(5) The Commission believes that the Spirit embodied in the proposed statement is its most important aspect.

DECEMBER 1967 AAUP

WINTER ISSUE

bulletin

APPENDIX "C"

Statements on Rights and Freedoms of Students

Program for Faculty Responsibility and Authority

The Case for a Doctor of Arts Degree: A View from Junior College Faculty

Academic Freedom and Tenure:
- Texas A & M University
- Arkansas A & M College
- Cheyney State College

State-Wide Coordination and College and University Faculties

Academic Freedom in Church-Related Colleges and Universities

Texas Coordinating Board Statement on Academic Freedom, Tenure, and Responsibility

a publication of the American Association of University Professors

VOLUME 53 • NUMBER 4

TEXAS COORDINATING BOARD STATEMENT ON ACADEMIC FREEDOM, TENURE, AND RESPONSIBILITY

The following statement was adopted unanimously on October 16, 1967, by the Coordinating Board of the Texas College and University System. Drafted in the first instance by an Advisory Committee composed of faculty members and administrative officials from Texas colleges and universities, the statement as adopted has been brought to the attention of each junior and senior college and university in Texas. Those portions of the statement related to academic freedom and responsibility have been recommended for prompt implementation as institutional policy; the portion related to tenure is being presented to a special legislative study committee in the hope that it will be incorporated into a bill for action by the Texas Legislature.

The Association's Committee A on Academic Freedom and Tenure discussed the statement and recommended that it be published in the AAUP Bulletin so that it can come to the attention of the academic profession. The Committee hopes that the Texas statement will be of particular interest to persons and groups in other states which may be considering statewide policy in these important areas.

Statement on Academic Freedom, Tenure and Responsibility for Faculty Members in Texas Public Colleges and Universities

The statement which follows, issued in response to Section 14, Paragraph 2, of House Bill 1, 59th Texas Legislature, provides guiding principles designed to aid Texas colleges and universities in evalu-

ating the conditions of academic freedom, tenure, and responsibility that prevail on each campus.

I

Academic Freedom

Institutions of higher education are conducted for the common good. The common good depends upon a free search for truth and its free expression. Hence, it is essential that the faculty member be free to pursue scholarly inquiry without undue restriction, and to voice and publish his conclusions concerning the significance of evidence that he considers relevant. He must be free from the corrosive fear that others, inside or outside the university community, because their vision may differ from his own, may threaten his professional career or the material benefits accruing from it.

Each faculty member is entitled to full freedom in the classroom in discussing the subject which he teaches. Each faculty member is also a citizen of his nation, state, and community; and when he speaks, writes, or acts as such, must be free from institutional censorship or discipline.

II

Academic Responsibility

The concept of academic freedom must be accompanied by an equally demanding concept of responsibility, shared by governing boards, administrators, and faculty members.

The essential responsibilities of governing boards and administrators are set forth in the Standards for Colleges, adopted by the Southern Assocation of Colleges and Schools, as updated and revised.

The fundamental responsibilities of a faculty member as a teacher and scholar include a maintenance of competence in his field of specialization and the exhibition of such competence in lectures, discussions, or publications.

Exercise of professional integrity by a faculty member includes recognition that the public will judge his profession and his institution by his statements. Therefore, he should strive to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to avoid creating the impression that he speaks or acts for his college or university when he speaks or acts as a private person.

A faculty member should be judicious in the use of controversial material in the classroom and should introduce such material only as it has clear relationship to his subject field.

A faculty member has the responsibility to provide due notice of his intention to interrupt or terminate institutional services.

III

Tenure Policies

A. Tenure

Tenure means assurance to an experienced faculty member that he may expect to continue in his academic positions unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.

A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:

(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provisions that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years (even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years).

(2) Notice of nonreappointment, or of intention not to reappoint a faculty member, should be given in writing in accord with the following standards: (a) Not later than March 1 of the first academic year of probationary service, if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination. (b) Not later than December 15 of the second year of probationary service, if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination. (c) At least twelve months before the expiration of a probationary appointment after two or more years in the institution.

(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities.

Cases of bona fide financial emergency, or the phasing out of institutional programs requiring reduction of faculty, may permit exceptions of tenure regulatons in unusual circumstances.

B. **Faculty Dismissals**

Proper dismissal procedures, established in anticipation of their being needed, are essential to an effective tenure system. In the Texas public college and university system, these procedures should have the following components:

(1) These dismissal procedures apply to a faculty member who has tenure, or whose term appointment has not expired, or who alleges a **prima facie** case of a violation of academic freedom in the nonrenewal of his contract. If he **has** tenure or an unexpired appointment extending beyond the period of the proposed dismissal, the burden of proof is upon the administration to show adequate cause why he should be dismissed. If he does **not** have tenure, but contends that the nonrenewal of his contract constitutes a violation of his academic freedom, the burden of proof is upon the faculty member. If a faculty member on probationary appointment alleges that the nonrenewal of his contract constitutes a violation of academic freedom, he may request that his allegations be given preliminary consideration by a faculty committee. The committee shall then recommend whether a hearing is warranted.

(2) The institution's procedure in dismissal cases described in (1) above should include, first, a bona fide effort to achieve a satisfactory resolution of difficulties through preliminary inquiry, discussion, or confidential mediation.

Should these efforts fail, presentation of reasonably detailed and formally written charges should be made to the concerned faculty member. Presentation of such charges shall provide for (a) a written response to the charges by the faculty member, if he wishes a hearing; (b) opportunity by the faculty member to exercise his right to be represented by counsel of his choosing, to have a hearing before a regularly elected faculty committee, to confront and cross-examine witnesses, to know the name and statement of a witness who for extraordinary reasons does not appear at the hearing, to respond orally to charges made against him, to have findings and recommendations made on each of the charges, and to be given a copy of a complete transcript of the hearing, including the findings of the faculty committee; (c) a review of the case, if essential, by an appropriate reviewing body—the review to include the findings and recommendations of the hearing committee, the opportunity of the faculty member and university representative for oral argument, the return of the proceeding to the hearing committee if the original recommendations are not sustained, the study of the hearing committee's reconsidered findings and recommendations, and the rendering of a final decision (which should be written in the rare case in which the hearing committee is overruled).

(3) If the faculty appointment is to be terminated, the faculty member, except in cases of moral turpitude, will receive his salary at least for one year or for the period of notice to which he is entitled under these regulations. He will be continued in his duties, for that period unless at the discretion of the institution he be granted a leave of absence with pay.

IV

Implementation

Within one year, and with appropriate faculty participation, each public institution in Texas is expected to draft its own written statement on academic freedom, tenure, and responsibilities. The statement should be based on the guiding principles described in the preceding paragraphs, and a copy should be filed with the Coordinating Board, Texas College and University System. Each statement should detail a procedure to be followed in case of dismissal of a tenured faculty member.

THE STANDARDS FOR NOTICE OF NONREAPPOINTMENT

(Endorsed by The Fiftieth Annual Meeting)

Because a probationary appointment, even though for a fixed or stated term, carries an expectation of renewal, the faculty member should be explicitly informed of a decision not to renew his appointment, in order that he may seek a position at another college or university. Such notice should be given at an early date, since a failure to secure another position for the ensuing academic year will deny the faculty member the opportunity to practice his profession. The purpose of this Statement is to set forth in detail, for the use of the academic profession, those standards for notice of nonreappointment which the Association over a period of years has actively supported and which are expressed as a general principle in the 1940 **Statement of Principles on Academic Freedom and Tenure.**

The Standards for Notice

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

(1) **Not later than March 1 of the first academic year of service,** if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

(2) **Not later than December 15 of the second year of service,** if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

(3) At least twelve months before the expiration of an appointment after two or more years in the institution.

APPENDIX "D"

WU western union **Telegram**

1044A CDT MAY 9 69 NSA056

NS NS PPA003 PM PD VT

AUSTIN TEX 9 1040A CST

1969 MAY 9 AM 10 55

DR JACK ROGERS, PRESIDENT, DLY 75
ODESSA COLLEGE ODESSA TEX

DEAR DR ROGERS: SENATE BILL 512 PERTAINING TO ACADEMIC TENURE WILL BE HEARD IN THE SENATE COMMITTEE ON STATE AFFAIRS ON MONDAY MAY 19 1969 AT 2:00 PM I WOULD APPRECIATE THE PRESENCE OF DR SINDERMANN OF YOUR FACULTY IN ORDER THAT HE CAN TESTIFY ON THIS BILL

OSCAR H MAUZY SENATOR

(1042).

8F-1201 (R5-69)

The Senate of
The State of Texas
Austin

WILLIAM T. "BILL" MOORE
DISTRICT 5
BRYAN

April 16, 1969

Mr. Robert Sindermann
P. O. Box 3752
Odessa, Texas 79760

Dear Mr. Sindermann:

Thank you for your letter concerning the two bills involving junior colleges in your area. Since you have expressed interest in these bills, I would like to invite you to testify on both when hearings are held. Senate Bill 512 will be heard Wednesday, April 23 at 2:00 P.M. in the Senate Chamber. Although this bill is first on the calendar, we have had no hearings this current week, and it is possible that the nineteen bills scheduled for hearing may interfere with the position of S.B. 512. If this is true, I will attempt to notify you.

Senate Bill 531, creating Permian State College, is scheduled for hearing on Monday, April 28. By this date I do hope that we will have had no more filibusters, as this week, and that we will be on schedule as much as possible. If there is any change, again I will notify you.

We have attempted this year to provide both proponents and opponents of a bill a full, fair and complete hearing. If you have any other questions please do write to me.

Sincerely Yours
William T. (Bill) Moore
WTM/bb

The Senate of
The State of Texas
Austin

OSCAR H. MAUZY
DISTRICT 23
SOUTHWEST DALLAS COUNTY

COMMITTEES:
CHAIRMAN:
FEDERAL PROGRAMS AND RELATIONS
VICE-CHAIRMAN:
EDUCATION
MEMBER:
CLAIMS
CONSTITUTIONAL AMENDMENTS
INSURANCE
INTERSTATE COOPERATION
LEGISLATIVE, CONGRESSIONAL AND JUDICIAL DISTRICTS
PRIVILEGES AND ELECTIONS
STATE DEPARTMENTS AND INSTITUTIONS
YOUTH AFFAIRS

April 16, 1969

Dr. Robert Sindermann
State President
Texas Junior College Teachers
Association
Odessa College
P. O. Box 3752
Odessa, Texas 79760

Dear Doctor Sindermann:

Thank you for your letter of April 9, 1969.

I hope you can be with us at the hearing on Senate Bill 512 on April 23, 1969, before the State Affairs Committee.

I will be pleased to discuss with you, and the other members of your group who will be here that day, the matters raised in your question.

Sincerely,

Oscar H. Mauzy

APPENDIX "E"

May 15, 1969

TO WHOM IT MAY CONCERN:

We, the undersigned, are members of the faculty of the Social Science Department of Odessa Junior College and attest to the fact that Robert Sindermann is a totally competent person professionally and that we feel that nothing that he has said or done has, in any way, derogated from his competence in the classroom as a lecturer in Government at Odessa Junior College.

Truett L. Hilliard

David Yeilding

Tom J. Heiting

Dick K. Kennedy

Darius J. Conger

Ina Mae McCollom

Robert B. Porter

Helen K. Reinhardt, Ph.D.

Mary Jane Gentry

Ralph R. Swafford

APPENDIX "F"

ODESSA COLLEGE
Office of the President
Founded In 1946
P. O. Box 3752
Odessa, Texas 79760

May 19, 1969

Mr. Robert P. Sindermann
Social Science Department
Odessa College
Odessa, Texas 79760

Dear Mr. Sindermann:

The Board of Regents on May 6, 1969, voted to approve my recommendation not to renew your contract for 1969-70. You have been supplied with a statement, with attachments, indicating the basis for this recommendation.

Sincerely,

Jack Rodgers
President

js

MOTION FOR MORE DEFINITE STATEMENT

(Number and Title Omitted. Filed: Jun 11, 1969)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME the Board of Regents of Odessa Junior College in their official capacity, and file this, their Motion for More Definite Statement, and would respectively show:

1.

That in paragraphs numbered XXI, XXII, and XXVII reference is made to other members of the faculty of Odessa Junior College but such faculty members are not named and are not made parties to the suit. These defendants are entitled to know the names of such alleged faculty members, if any there are, and on whose behalf said suit is purportedly brought.

WHEREFORE, premises considered, these defendants pray that this motion be set down for hearing and that upon hearing hereof the Court order that the names of the alleged faculty members be disclosed and included in the pleadings if in fact they are to be parties to the suit or in no way involved therein.

RAYMOND D. WIER
300 North Jackson Avenue
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS, BUNTON
& McCOLLUM
P. O. Box 1552, Odessa, Texas 79760
By s/ W. O. Shafer
W. O. Shafer
By s/ Lucius D. Bunton
Lucius D. Bunton

ATTORNEYS FOR DEFENDANT THE BOARD OF REGENTS OF ODESSA JUNIOR COLLEGE

—0—

MOTION TO STRIKE

(Number and Title Omitted. Filed: Jun 11, 1969)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Board of Regents of Odessa Junior College in their official capacity and as defendants in the above case and move to strike certain portions of Plaintiff's Original Complaint.

I.

These defendants move to strike paragraph numbered VII for the reason that the same is hearsay and has no probative value and is prejudicial.

II.

These defendants move to strike paragraph numbered VIII for the reason that the same is hearsay and has no probative value and is prejudicial.

III.

These defendants move to strike paragraph num-

bered X for the reason that the same is hearsay and has no probative value and is prejudicial.

IV.

These defendants move to strike paragraph numbered XII for the reason that the same is hearsay and has no probative value and is prejudicial.

V.

These defendants move to strike paragraph numbered XIII for the reason that the same is hearsay and has no probative value and is prejudicial.

VI.

These defendants move to strike paragraph numbered XIV for the reason that the same is hearsay and has no probative value and is prejudicial.

WHEREFORE, premises considered, these defendants pray that this motion be set down for hearing and that upon hearing hereof the above paragraphs be stricken from Plaintiff's Original Complaint.

RAYMOND D. WIER
300 North Jackson Avenue
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS,
BUNTON & McCOLLUM
P. O. Box 1552, Odessa, Texas 79760
By s/ W. O. Shafer
W. O. SHAFER
By s/ Lucius D. Bunton
LUCIUS D. BUNTON

ATTORNEYS FOR DEFENDANT
THE BOARD OF REGENTS OF
ODESSA JUNIOR COLLEGE

ORIGINAL ANSWER OF THE BOARD OF REGENTS OF ODESSA JUNIOR COLLEGE

(Number and Title Omitted. Filed: Jun 11, 1969)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME the Board of Regents of Odessa Junior College in their official capacity as members of such Board and file this, their original answer, subject to their other pleadings herein, and for such would respectfully show to the Court the following, to-wit:

FIRST DEFENSE

1. These defendants admit the allegations contained in paragraph numbered I of Plaintiff's Original Complaint.

2. These defendants admit the allegations contained in paragraph numbered II. of Plaintiff's Original Complaint.

3. These defendants admit the allegations contained in paragraph numbered III. of Plaintiff's Original Complaint.

4. These defendants deny the allegations contained in paragraph numbered IV. of Plaintiff's Original Complaint.

5. These defendants admit the allegations contained in paragraph numbered V. of Plaintiff's Original Complaint.

6. These defendants admit the allegations contained in paragraph numbered VI. of Plaintiff's Original Complaint.

7. These defendants deny the allegations contained in paragraph numbered VII. of Plaintiff's Original Complaint.

8. These defendants are without sufficient information to admit or deny the allegations contained in paragraph numbered VIII of Plaintiff's Original Complaint, and therefore deny the same.

9. These defendants admit the allegations contained in paragraph numbered IX. of Plaintiff's Original Complaint.

10. These defendants deny the allegations contained in paragraph numbered X. of Plaintiff's Original Complaint.

11. These defendants admit the allegations contained in paragraph numbered XI. of Plaintiff's Original Complaint.

12. These defendants admit the allegations contained in paragraph numbered XII. of Plaintiff's Original Complaint.

13. These defendants deny the allegations contained in paragraph numbered XIII. of Plaintiff's Original Complaint.

14. These defendants deny the allegations contained in paragraph numbered XIV. of Plaintiff's Original Complaint.

15. These defendants admit the allegations contained in paragraph numbered XV. of Plaintiff's Original Complaint.

16. These defendants deny the allegations contained in paragraph numbered XVI. of Plaintiff's Original Complaint.

17. These defendants deny the allegations contained in paragraph numbered XVII. of Plaintiff's Original Complaint.

18. These defendants deny the allegations contained in paragraph numbered XVIII. of Plaintiff's Original Complaint.

19. These defendants deny the allegations contained in paragraph numbered XIX. of Plaintiff's Original Complaint.

20. These defendants deny the allegations contained in paragraph numbered XX. of Plaintiff's Original Complaint.

21. These defendants deny the allegations contained in paragraph numbered XXI. of Plaintiff's Original Complaint.

22. These defendants deny the allegations contained in paragraph numbered XXII. of Plaintiff's Original Complaint.

23. These defendants deny the allegations contained in paragraph numbered XXIII. of Plaintiff's Original Complaint.

24. These defendants deny the allegations contained in paragraph numbered XXIV. of Plaintiff's Original Complaint.

25. These defendants deny the allegations contained in paragraph numbered XXV. of Plaintiff's Original Complaint.

26. These defendants deny the allegations contained in paragraph numbered XXVI. of Plaintiff's Original Complaint.

27. These defendants deny the allegations contained in paragraph numbered XXVII. of Plaintiff's Original Complaint.

SECOND DEFENSE

Subject to the admissions heretofore made and such admissions as may be made on the trial hereof, these defendants deny the allegations contained in Plaintiff's Original Complaint and demand strict proof thereof.

THIRD DEFENSE

These defendants allege that the Odessa Junior College enterd into a contract with the plaintiff to perform services as a teacher and instructor, which contract expired on May 31, 1969: The Odessa Junior College has done and performed each and every thing it was required to perform under said contract and has discharged its full and complete responsibilities therein and has no further obligation or liability to the plaintiff herein. It is alleged by the plaintiff and it is a fact that Odessa Junior College has no tenure system and none has been acquired by the plaintiff herein and these defendants have no legal obligation in connection therewith.

FOURTH DEFENSE

These defendants further allege and show that the President of Odessa Junior College who is charged by law with the duty of making recommendations to the Board did not recommend to the Board that the contract of the plaintiff be renewed and this Board has no legal authority, under such circumstances, to renew said contract and therefore has no liability of any kind to the plaintiff herein.

FIFTH DEFENSE

These defendants further show and allege that each and every decision made by them in connection with the contract with the plaintiff was made in the utmost good faith, under legal advice, and in compliance wih and pursuant to the laws of the State of Texas with which they are bound and obligated to comply.

WHEREFORE, premises considered, these de-

fendants pray that the plaintiff take nothing by his suit and these defendants be discharged with their costs.

RAYMOND D. WIER
300 North Jackson Avenue
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS,
BUNTON & McCOLLUM
P. O. Box 1552, Odessa, Texas 79760

By s/ W. O. Shafer
W. O. SHAFER

By s/ Lucius D. Bunton
LUCIUS D. BUNTON

ATTORNEYS FOR DEFENDANT
THE BOARD OF REGENTS OF
ODESSA JUNIOR COLLEGE

—0—

ORIGINAL ANSWER OF THE DEFENDANT, DR. JACK RODGERS

(Number and Title Omitted. Filed: Jun 11, 1969)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Dr. Jack Rodgers, individually and as President of Odessa Junior College and files this, his original answer in this cause and for such would respectively show to the Court the following, to-wit:

FIRST DEFENSE

1. This defendant admits the allegations contained in paragraph numbered I. of Plaintiff's Original Complaint.

2. This defendant admits the allegations contained in paragraph numbered II. of Plaintiff's Original Complaint.

3. This defendant admits the allegations contained in paragraph numbered III. of Plaintiff's Original Complaint.

4. This defendant denies the allegations contained in paragraph numbered IV. of Plaintiff's Original Complaint.

5. This defendant admits the allegations contained in paragraph numbered V. of Plaintiff's Original Complaint.

6. This defendant admits the allegations contained in paragraph numbered VI. of Plaintiff's Original Complaint.

7. This defendant denies the allegations contained in paragraph numbered VII. of Plaintiff's Original Complaint.

8. This defendant is without sufficient information to admit or deny the allegations contained in paragraph numbered VIII. of Plaintiff's Original Complaint, and therefore denies the same.

9. This defendant admits the allegations contained in paragraph numbered IX. of Plaintiff's Original Complaint.

10. This defendant denies the allegations contained in paragraph numbered X. of Plaintiff's Original Complaint.

11. This defendant admits the allegations contain-

ed in paragraph numbered XI. of Plaintiff's Original Complaint.

12. This defendant admits the allegations contained in paragraph numbered XII. of Plaintiff's Original Complaint.

13. This defendant denies the allegations contained in paragraph numbered XIII. of Plaintiff's Original Complaint.

14. This defendant denies the allegations contained in paragraph numbered XIV. of Plaintiff's Original Complaint.

15. This defendant admits the allegations contained in paragraph numbered XV. of Plaintiff's Original Complaint.

16. This defendant denies the allegations contained in paragraph numbered XVI. of Plaintiff's Original Complaint.

17. This defendant denies the allegations contained in paragraph numbered XVII. of Plaintiff's Original Complaint.

18. This defendant denies the allegations contained in paragraph numbered XVIII. of Plaintiff's Original Complaint.

19. This defendant denies the allegations contained in paragraph numbered XIX. of Plaintiff's Original Complaint.

20. This defendant denies the allegations contained in paragraph numbered XX. of Plaintiff's Original Complaint.

21. This defendant denies the allegations contained in paragraph numbered XXI. of Plaintiff's Original Complaint.

22. This defendant denies the allegations contain-

ed in paragraph numbered XXII. of Plaintiff's Original Complaint.

23. This defendant denies the allegations contained in paragraph numbered XXIII. of Plaintiff's Original Complaint.

24. This defendant denies the allegations contained in paragraph numbered XXIV. of Plaintiff's Original Complaint.

25. This defendant denies the allegations contained in paragraph numbered XXV. of Plaintiff's Original Complaint.

26. This defendant denies the allegations contained in paragraph numbered XXVI. of Plaintiff's Original Complaint.

27. This defendant denies the allegations contained in paragraph numbered XXVII. of Plaintiff's Original Complaint.

SECOND DEFENSE

Subject to such admissions heretofore made and such admissions as may be made on the trial hereof, this defendant denies the allegations contained in Plaintiff's Original Complaint and demands strict proof thereof.

THIRD DEFENSE

This defendant alleges that he is charged by law with the duty of exercising his best judgment in the matter of the employment of instructors or teachers at Odessa Junior College and to make recommendations in connection therewith to the Board of Regents. He alleges and shows that in pursuance of the exercise of his best judgment he did not recommend that the plaintiff's contract be renewed for adequate reasons and sufficient cause. He alleges that in his

best wisdom and judgment the renewal of said contract would not be in the best interests of Odessa Junior College, and following that exercise and in pursuance of the exercise of such wisdom and judgment, he did not recommend the renewal thereof. This defendant alleges that his action in so doing was in the utmost good faith and discharge of duties imposed upon him by law and in the discharge of responsibilities placed upon him as President of Odessa Junior College.

FOURTH DEFENSE

This defendant further alleges and shows that before making or disclosing his decision he asked for and received legal advice from the attorney regularly retained by Odessa Junior College and was by such attorney advised that he had legal authority to reach a decision not to renew the contract of the plaintiff, if he chose to do so, and that he was under no legal obligation that mandatorily required him to renew the same. This defendant further alleges that he believed then and believes now that he acted entirely in accordance with the law and alleges that his actions were taken only under advice of competent counsel.

FIFTH DEFENSE

This defendant further alleges and shows that his actions were not made by way of retaliation or in bad faith in any manner whatever but were based solely and entirely upon the best interests of Odessa Junior College and represented his discharge of an administrative decision imposed upon him by law and in which decision he is necessarily required to exercise his best judgment, which he did.

SIXTH DEFENSE

This defendant further shows and alleges that no hearing was granted to the plaintiff hereon and none was requested by him until a letter was written by the plaintiff at or simultaneously with the filing of this lawsuit and received by this defendant after he had read of the lawsuit being filed in the newspapers. Neither this defendant nor anyone else was given any opportunity to provide the plaintiff with any sort of hearing until he had been sued in this case and the matter placed in the hands of this Court.

WHEREFORE, premises considered, this defendant prays that the plaintiff take nothing by his suit and this defendant be discharged with his costs.

RAYMOND D. WIER
300 North Jackson Avenue
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS,
BUNTON & McCOLLUM
P. O. Box 1552, Odessa, Texas 79760

By s/ W. O. Shafer
W. O. SHAFER

By s/ Lucius D. Bunton
LUCIUS D. BUNTON

ATTORNEYS FOR DEFENDANT
DR. JACK RODGERS

—0—

ORIGINAL ANSWER OF THE DEFENDANTS, CHARLES R. PERRY, WILLIAM L. PETTIT, GUY ELLIOTT, JAMES F. OCKER, G. KIRK HARDING, R. C. MASON, OTTO PAVLICEK AND JOE C. ZANT

(Number and Title Omitted. Filed: Jun 11, 1969)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Charles R. Perry, William L. Pettit, Guy Elliott, James F. Ocker, G. Kirk Harding, R. C. Mason, Otto Pavlicek and Joe Zant, in their individual capacities and file this their original answer and for such would respectfully show to the Court the following to-wit:

FIRST DEFENSE

1. These defendants admit the allegations contained in paragraph numbered I. of Plaintiff's Original Complaint.

2. These defendants admit the allegations contained in paragraph numbered II. of Plaintiff's Original Complaint.

3. These defendants admit the allegations contained in paragraph numbered III. of Plaintiff's Original Complaint.

4. These defendants deny the allegations contained in paragraph numbered IV. of Plaintiff's Original Complaint.

5. These defendants admit the allegations contained in paragraph numbered V. of Plaintiff's Original Complaint.

6. These defendants admit the allegations contained in paragraph numbered VI. of Plaintiff's Original Complaint.

7. These defendants deny the allegations contained in paragraph numbered VII. of Plaintiff's Original Complaint.

8. These defendants are without sufficient information to admit or deny the allegations contained in paragraph numbered VIII of Plaintiff's Original Complaint, and therefore deny the same.

9. These defendants admit the allegations contained in paragraph numbered IX. of Plaintiff's Original Complaint.

10. These defendants deny the allegations contained in paragraph numbered X. of Plaitiff's Original Complaint.

11. These defendants admit the allegations contained in paragraph numbered XI. of Plaintiff's Original Complaint.

12. These defendants admit the allegations contained in paragraph numbered XII. of Plaintiff's Original Complaint.

13. These defendants deny the allegations contained in paragraph numbered XIII. of Plaintiff's Original Complaint.

14. These defendants deny the allegations contained in paragraph numbered XIV. of Plaintiff's Original Complaint.

15. These defendants admit the allegations contained in paragraph numbered XV. of Plaintiff's Original Complaint.

16. These defendants deny the allegations con-

tained in paragraph numbered XVI. of Plaintiff's Original Complaint.

17. These defendants deny the allegations contained in paragraph numbered XVII. of Plaintiff's Original Complaint.

18. These defendants deny the allegations contained in paragraph numbered XVIII. of Plaintiff's Original Complaint.

19. These defendants deny the allegations contained in paragraph numbered XIX. of Plaintiff's Original Complaint.

20. These defendants deny the allegations contained in paragraph numbered XX. of Plaintiff's Original Complaint.

21. These defendants deny the allegations contained in paragraph numbered XXI. of Plaintiff's Original Complaint.

22. These defendants deny the allegations contained in paragraph numbered XXII. of Plaintiff's Original Complaint.

23. These defendants deny the allegations contained in paragraph numbered XXIII. of Plaintiff's Original Complaint.

24. These defendants deny the allegations contained in paragraph numbered XXIV. of Plaintiff's Original Complaint.

25. These defendants deny the allegations contained in paragraph numbered XXV. of Plaintiff's Original Complaint.

26. These defendants deny the allegations contained in paragraph numbered XXVI. of Plaintiff's Original Complaint.

27. These defendants deny the allegations contained in paragraph numbered XXVII. of Plaintiff's Original Complaint.

SECOND DEFENSE

Subject to such admission heretofore made and such admissions as may be made on the trial hereof, these defendants deny the allegations contained in Plaintiff's Original Complaint and demand strict proof thereof.

THIRD DEFENSE

These defendants allege that the Odessa Junior College entered into a contract with the plaintiff to perform services as a teacher and instructor, which contract expired on May 31, 1969. The Odessa Junior College has done and performed each and every thing it was required to perform under said contract and has discharged its full and complete responsibilities therein and has no further obligation or liability to the plaintiff herein. It is alleged by the plaintiff and it is a fact that Odessa Junior College has no tenure system and none has been acquired by the plaintiff herein and these defendants have no legal obligation in connection therewith.

FOURTH DEFENSE

These defendants further allege and show that the President of Odessa Junior College who is charged by law with the duty of making recommendations to the Board did not recommend to the Board that the contract of the plaintiff be renewed and this Board has no legal authority, under such circumstances, to renew said contract and therefore has no liability of any kind to the plaintiff herein.

FIFTH DEFENSE

These defendants further show and allege that each and every decision made by them in connection with the contract with the plaintiff was made in the utmost good faith, under legal advice, and in compliance with and pursuant to the laws of the State of Texas with which they are bound and obligated to comply.

WHEREFORE, premises considered, these defendants pray that the plaintiff take nothing by his suit and these defendants be discharged with their costs.

RAYMOND D. WIER
300 North Jackson Avenue
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS,
BUNTON & McCOLLUM
P. O. Box 1552, Odessa, Texas 79760

By s/ W. O. Shafer
W. O. SHAFER

By s/ Lucius D. Bunton
LUCIUS D. BUNTON

ATTORNEYS FOR DEFENDANTS
CHARLES R. PERRY, WILLIAM L. PETTIT, GUY ELLIOTT, JAMES F. OCKER, G. KIRK HARDING, R. C. MASON, OTTO PAVLICEK AND JOE C. ZANT.

—0—

AFFIDAVIT IN SUPPORT OF A MOTION FOR AN INJUNCTION

(Number and Title Omitted. Filed: Jul 14, 1969)

Robert Sindermann, being first duly sworn, on oath deposes and presents the following:

1.

That he is the Plaintiff in the hereinabove styled case.

2.

That his contract with Odessa Junior College was not renewed for the school year 1969-1970.

3.

That he was given no written charges as to the reasons for his contract not being renewed.

4.

That the only statements in regards to the reasons for his contract not being renewed was an 11 page press release issued by the Defendant, Dr. Jack Rodgers.

5.

That the only reasons gleaned from the above mentioned press release as to the Plaintiff's contract not being renewed were his participation in the public controversial issues.

6.

That the Plaintiff was given no hearing of any nature by any person or body connected with Odessa Junior College before the decision was made on May 16, 1969, not to renew his contract.

7.

That this affidavit is made in the support of a motion for Injunction in which this court should order the Defendants to maintain the same contractual relationship with the Plaintiff that it had for the school term 1968-1969: In that the Defendants should be ordered to hold a hearing along the lines established by the Texas Coordinating Board.

s/ Robert P. Sindermann
ROBERT P. SINDERMANN

SUBSCRIBED and SWORN to before me this 27th day of May, 1969.

s/ Chris Horn
Chris Horn, A Notary Public in
(SEAL) and for Ector County, Texas
My commission expires June 1971.

—0—

ORDER DENYING PETITION FOR TEMPORARY RESTRAINING ORDER

(Number and Title Omitted. Filed: Jul 15, 1969)

Came on to be considered the Plaintiff's Petition for Temporary Restraining Order in the above cause, and the Court, having considered the Petition, the briefs filed herein and heard the oral argument of counsel, is of the opinion that said Petition for Temporary Restraining Order should be, and hereby is DENIED.

ENTERED THE 15th day of July, 1969.

s/ Ernest Guinn
UNITED STATES DISTRICT JUDGE

—0—

MOTION TO DISMISS OF THE DEFENDANT BOARD OF REGENTS OF ODESSA JUNIOR COLLEGE

(Number and Title Omitted. Filed: Jul 18, 1969)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the defendant, the Board of Regents of Odessa Junior College and moves the Court to dismiss this suit insofar as it relates to the Board of Regents of Odessa Junior College as a party defendant, and as grounds for such motion would respectfully show to the Court the following, to-wit:

1.

In Paragraph IV of the Plaintiff's Original Complaint, the Board of Regents of Odessa Junior College, as a body, is made a party defendant in this case and it is alleged therein that such Board of Regents is "a body corporate duly organized and existing under the general laws of the State of Texas."

Whether the Board as such is a "body corporate" may be subject to question but whether it is or whether it is not, still yet it is not a proper party to this suit. A "Board" as such is not a person within the meaning of 42 U.S.C.A. § 1983 under which this lawsuit is brought. Neither is the "Board" a proper party under 28 U.S.C.A. § 1343.

In the case of **Roberts v. Trapnell**, 213 Fed. Sup. 47 (1962) the Court had before it a suit against a municipal corporation and the governing board of such municipality. The Court dismissed the suit which was brought under 42 U.S.C.A. § 1983 and stated its reasons therefor as follows:

"(1) Lower Merion Township, a municipal corporation, is a First Class Township and governed by the Pennsylvania First Class Township Code, 53 P.S. § 55101 et seq. Under such Code, the corporate power of a township of the first class is vested in the Board of Township Commissioners. See 53 P.S. § 56502. The Board has the general power to prescribe the manner in which the powers of the Township are to be carried out and to regulate the affairs of the Township.

(2) The Civil Rights Act under which this action was brought does not include municipalities within the definition of "persons" who may be sued for violation of § 1983. Monroe v. Pape, 365 U.S. 167,187,191,81 S.Ct. 473, 5 L.Ed. 2d 492(1961); Egan v. City of Aurora, Ill., 365 U.S. 514, 81 S.Ct. 684, 5 L.Ed. 2d 741 (1961); Hewitt v. City of Jacksonville, 188 F. 2d 423, 424, (5th Cir. 1951), cert. den., 342 U.S. 835, 72 S.Ct. 58, 96 L.Ed. 631 (1951); Charlton v. City of Hialeah, 188 F.2d 421, 423.(5th Cir. 1951).

(3) In this case, the Complaint against the "Commissioners of Lower Merion Township" will be dismissed for failure to state a claim on which relief can be granted in this court and for lack of jurisdiction over the subject matter. The "Commissioners of Lower Merion Township," who comprise the Board possessing the corporate power of the municipal corporation, were sued as a legal entity. This Complaint cannot be sustained under 42 U.S.C.A. § 1983. Handy Cafe, Inc., v. Justices of the Superior Court, 248 F.2d 485 (1st Cir. 1957), cert. den. 356 U.S. 902, 78 S.Ct. 561, 2 L.Ed.2d 580 (1958). See Monroe v. Pape, supra,

and Egan v. City of Aurora, supra. There is no diversity of citizenship."

Again, in the case of **Johnson v. Hackett,** 284 Fed. Sup 933 (968) the Court had before it another suit against a municipal corporation and the governing body of such corporation. The Court again dismissed the complaint as against the township and as against the Board and disposed of the matter summarily in a very brief statement as follows:

"(1, 2) Bristol Township, a municipal corporation, is not a "person" subject to suit under the Act, Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961). Under Pennsylvania law, the corporate power of townships of the first class is vested in the Board of Commissiners. 53 P.S. § 56502. As a body politic, the Board is likewise not subject to suit under the Act. Roberts v. Trapnell, 213 F. Supp. 47 (E.D.Pa. 1962). No attempt has been made to sue the Commissioners individually.

The complaint will be dismissed as to Bristol Township and the Board of Commissioners."

The Supreme Court of the United States in a unanimous opinion insofar as this particular point was concerned, set this matter at rest long ago in the case of **Monroe v. Pape,** 365 U.S. 167, 5 L.Ed.2d492, 81 S.Ct. 473, when Mr. Justice Douglas, delivering the opinion for the entire Court, stated as follows:

"The response of the Congress to the proposal to make municipalities liable for certain actions

being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them. Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted."

The above language of Mr. Justice Douglas makes it absolutely and totally clear that the word "person" as used in Section 1983, was not intended to include corporate entities or, for that matter, the Boards in whose hands the affairs of the corporate entity are entrusted.

WHEREFORE, premises considered, the defendant The Board of Regents of Odessa Junior College, as such, respectfully moves the Court to dismiss the cause of action as to it and that all costs incurred in that connection be assessed against the plaintiff.

RAYMOND D. WIER
300 North Jackson Avenue
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS,
BUNTON & McCOLLUM
P. O. Box 1552, Odessa, Texas

By s/ W. O. Shafer
W. O. SHAFER

ATTORNEYS FOR DEFENDANT
THE BOARD OF REGENTS OF
ODESSA JUNIOR COLLEGE

—0—

MOTION FOR SUMMARY JUDGMENT ON BEHALF OF THE DEFENDANTS, CHARLES R. PERRY, WILLIAM L. PETTIT, GUY ELLIOTT, JAMES F. OCKER, G. KIRK HARDING, R. C. MASON, OTTO PAVLICEK AND JOE C. ZANT, INDIVIDUALLY, AND DR. JACK RODGERS, INDIVIDUALLY AND AS PRESIDENT OF ODESSA JUNIOR COLLEGE

(Number and Title Omitted. Filed: Jul 18, 1969)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Charles R. Perry, William L. Pettit, Guy Elliott, James F. Ocker, G. Kirk Harding, R. C. Mason, Otto Pavlicek and Joe C. Zant, individually, and Dr. Jack Rodgers, individually and as President of Odessa Junior College, defendants in the above entitled and numbered cause, and move the Court to grant them a summary judgment in this cause and as grounds therefor respectfully show to the Court the following:

I.

The pleadings and affidavits on file conclusively show that there is no justiciable issue of fact in this case and that these defendants are entitled to judgment as a matter of law.

II.

The Plaintiff's Original Complaint in this case by which he is irrevocably bound confesses and admits that these defendants acted not only upon adequate cause but upon severe provocation in declining to enter into a new contract of employment with the plaintiff in the case.

III.

The pleadings on file in this case and particularly the pleadings of the plaintiff herein, establish as undisputed the following facts:

(a) That the plaintiff was employed as a teacher at Odessa Junior College for the school year 1968-1969, which ended May 31, 1969. (Plaintiff's Original Complaint, Par. VI)

(b) That Odessa Junior College has no tenure system and this fact was not only known to the plaintiff at the time he entered into his original contract with the College but such fact was affirmatively stated in the Faculty Guide which was in use at the time of the commencement of his employment, as well as at all times pertinent hereto. (Plaintiff's Original Complaint, Par. VII; Plaintiff's Appendix "A", page 3)

(c) That on the afternoon of April 22, 1969 the plaintiff requested permission from the President of the College to be absent from his classroom and his teaching duties for the purpose of appearing and testifying at Austin, Texas in support of certain legislation. This permission was denied and refused by the President of the College, whose decision in such matters is final under the provisions of the Faculty Guide. In spite of the refusal, the plaintiff was absent from his classes and went to Austin to testify in connection with the legislation involved but no hearing was held. Again, under date of April 25, 1969 the plaintiff, by letter, requested permission from the Chairman of his Department to be absent from his classes on April 28, 1969 for the purpose again of going to Austin to testify in support of certain legislation. The plaintiff was again denied permission to

be absent from his classroom duties and this refusal was delivered in writing to his home on April 26, 1969. In spite of this refusal by his superiors, the plaintiff by letter dated April 27, 1969 advised the Chairman of his Department that he would be absent anyway on April 28, 1969, and he was so absent from his classes contrary to the instructions of the Administration. (Plaintiff's Appendix "A", Pages 7 and 8). Plaintiff affirmatively pleads in his Complaint and it is his position that these absences were "unauthorized" and without "the College Administration's approval". (Plaintiff's Original Complaint, Par. XII)

(d) That as an integral part of his case, plaintiff's position is that the undisputed, willfull and unauthorized absences from his classroom are not "sufficient cause for the dismissal of a faculty member". (Plaintiff's Original Complaint, Par. XIII)

(e) That this is not a case in which the contract existing between the plaintiff and Odessa College was terminated but it is a case in which the plaintiff seeks to force the College to make a new contract with him for a new and different school year, to-wit: 1969-1970. (Plaintiff's Original Complaint, Par. XV)

(f) That the plaintiff had written notice of the reason for his contract not being renewed at least on May 23, 1969, which was the date on which this suit was filed because he was at that time in possession of Appendix "A" attached to his Complaint in which his denial of constituted authority and willful insubordination by violating written instructions was clearly set out.

(g) That in the Appendix attached to Plaintiff's

Original Complaint it is affirmatively shown that his activities in connection with a Committee has never been called to his attention by any member of the Board of Regents or by any member of the Administration. The plaintiff does not plead any facts in his Original Complaint in contradiction or in derogation of this portion of the Appendix upon which he relies and bases his case. Neither does he plead at any place in his Complaint where his constitutional or civil rights were denied him or refused him, but, on the contrary, his pleading and his attachments affirmatively show that he at all times fully exercised all such rights. His pleadings do show that his actions in connection with the Committee in question were in clear violation of the statement on Academic Freedom as adopted by Odessa Junior College. (Appendix "A", page 6) (Academic Responsibility Appendix "C", Page 2 and 3)

(h) That under date of May 19, 1969 the President of Odessa Junior College furnished Mr. Sindermann with a statement indicating the basis for his contract not being renewed. (This letter is an Appendix to Plaintiff's Original Complaint but is not identifed by letter or number.)

Each and all of the above and foregoing facts are established without contradiction or dispute by the plaintiff's own pleadings in this case and are not only admitted by him but are relief upon by him and constitute judicial admissions.

IV.

The thrust of the plaintiff's pleading is to seek relief to which he is not entitled under his own pleadings. His pleadings show that the contract under which he was employed has expired. He asks this

Court to make a new contract for him by forcing the Board of Regents in a non-tenure college, in a non-tenure state, to employ him for an additional period of time and for a different school year than that for which he was employed.

V.

The basis for his suit is without foundation in law, and seeks to unilaterally create a contract that does not exist by imposing terms upon the Regents which they did not accept when the contract was made.

VI.

His basic and fundamental premise is to superimpose upon Odessa Junior College the requirements of a tenure college, which it is not, and by such superimposition thereby creating for himself an artificial denial of constitutional rights and due process by ignoring the fact that his dismissal was upon adequate cause under a tenure or non-tenure policy. Even if this premise, for the purpose of this motion only, is considered by the Court, still yet, the plaintiff's case must fall. His interpretation of due process as pleaded by him is notice of his charges and a hearing. It is undisputed and without question that he has received notice of the charges against him and the reasons for his dismissal. A hearing would be futile and superfluous. The only purpose that could be served by a hearing would be to determine the sufficiency of his derelictions. The reasons for his dismissal are established as a fact without dispute or controversy. His own pleadings affirmatively show a complete violation and disregard of affirmative instructions from the Administration on two occasions within a period of ten days. The question involved is

one of discipline and authority. It strikes at the very heart of an orderly administration of college affairs by constituted authority. The question of whether his deliberate and willful violation of the written orders of his superiors on two occasions is sufficient and adequate grounds for his contract not being renewed is a matter of law for the Court. There is no fact issue involved to be determined at any hearing whether such hearing be before this Court or before a faculty committee or before any other body. It is conclusively and undeniably established by the record in this case that the violations deliberately and willfully occurred. The only question remaining in the case is one of law; to-wit: whether or not such violations are adequate reasons for non-renewal of the contract.

Therefore, even if it be conceded, for the purpose of this motion only, that due process, i.e., notice and hearing, are involved in this case, then plaintiff has established by his own pleadings that he has had ample notice and that no purpose could be served by a hearing of any kind before any Court or any body or any committee. Not only has he flaunted his insubordination before his superiors at the College, but he now flaunts that same insubordination before this Court by pleading affirmatively his willful disregard of written instructions of his superiors. The matter is one solely and entirely of discipline for insubordination. As a matter of law, the insubordination is not only adequate and sufficient reason for the nonrenewal of this contract, but are in fact compelling and imperative if there is any hope for discipline to be maintained in Odessa Junior College.

The authorities cited by the plaintiff to this Court have no application whatever to a disciplinary pro-

blem such as here presented under the most favorable interpretation of the plaintiff's pleading in this case. Even the Supreme Court of the United States recognizes this distinction and understands the problem involved. In the case of **Pickering v. Board of Education,** 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731, which case is the heart of plaintiff's authorities, recognizes that discipline by immediate superiors is of the highest priority in the operation of any school or college. In reaching its decision in that Pickering case, the Supreme Court of the United States said:

"**Thus no question of maintaining either discipline by immediate superiors** or harmony among co-workers is presented here." (Emphasis mine)

It could not be seriously contended by the plaintiff that freedom of speech includes the right to make trips to foreign cities over the objections and instructions of plaintiff's superiors, and absent himself from his classroom and his duties. (If such were true, a private first class in the army at San Francisco, would have the right to go to Washington to appear before the Congress on defense spending—regardless of the wishes of his commanding officer.)

VII.

Under any theory or any interpretation of plaintiff's pleadings, there is no fact issue in this case, nothing remains to be adjudicated, and the question presented is one only of law for determination by the Court.

WHEREFORE, premises considered, these defendants pray that judgment be entered for each

and all of them and costs be assessed against the plaintiff.

RAYMOND D. WIER
300 North Jackson Avenue
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS,
BUNTON & McCOLLUM
P. O. Box 1552, Odessa, Texas

B s/ W. O. Shafer
W. O. SHAFER

ATTORNEYS FOR DEFENDANTS CHARLES R. PERRY, WILLIAM L. PETTIT, GUY ELLIOTT, JAMES F. OCKER, G. KIRK HARDING, R. C. MASON, OTTO PAVLICEK AND JOE C. ZANT, INDIVIDUALLY, AND DR. JACK RODGERS, INDIVIDUALLY AND AS PRESIDENT OF ODESSA JUNIOR COLLEGE

—0—

AFFIDAVIT IN SUPPORT OF A MOTION OPPOSING SUMMARY JUDGMENT

(Number and Title Omitted. Filed: Jul 28, 1969)

Robert Sindermann, being first duly sworn, on oath deposes and presents the following:

1.

That he is the Plaintiff in the hereinabove styled case.

2.

That his contract with Odessa Junior College was not renewed for the school year 1969-1970.

3.

That he was given no written charges as to the reasons for his contract not being renewed.

4.

That the only statements in regards to the reasons for his contract not being renewed was an 11 page press release issued by the defendant, Dr. Jack Rodgers.

5.

That the only reasons gleaned from the above mentioned press release as to the Plaintiff's contract not being renewed were:

(1) His participation in the movement to elevate Odessa Junior College to a four year status;

(2) His name being appended to an ad which appeared in the local newspaper;

(3) His unapproved absence from the school on two occasions.

6.

That in leaving the school on the two occasions without getting administrative approval, the plaintiff felt he must testify before the Texas Senate's State Affairs Committee because the bill pending before that committee was sponsored by the group which the Plaintiff is the head of, Texas Junior College Teachers Association, and because he was invited to do so by Senator Moore the head of that committee.

7.

After not being able to obtain approval from the school, the Plaintiff relied upon the following statement in the Odessa College **Faculty Guide,** found on page 53:

> "The employee shall have 1/180 of his annual salary deducted for each day of such absences not approved by the departmental chairman, the dean of the college, or the president."

Plaintiff understood that this would be the only contractual penalty permissable to be imposed upon him for such absences and would not be the basis for the non-renewal of his contract.

8.

That the Plaintiff was given no hearing of any nature by any person or body connected with Odessa Junior College before the decision was made on May 16, 1969, not to renew his contract.

9.

That this affidavit is made in support of a Motion opposing Summary Judgment.

s/ Robert P. Sindermann
ROBERT P. SINDERMANN

SUBSCRIBED and SWORN to before me this 25th day of July, 1969.

s/ Sarah Lewallen,
Sarah Lewallen, A Notary Public
(SEAL) in and for Ector County, Texas
My commission expires June 1971.

MOTION OPPOSING DEFENDANT BOARD OF REGENTS OF ODESSA JUNIOR COLLEGE'S MOTION TO DISMISS AND BRIEF IN SUPPORT OR PLAINTIFF'S MOTION

(Number and Title Omitted. Filed: Jul 24, 1969)

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Robert P. Sindermann as above captioned moves the court to refuse Defendant Board of Regents of Odessa Junior College's Motion to Dismiss Plaintiff's cause against it and would show the Court as follows:

1.

Plaintiff sued the Defendant Board of Regents of Odessa Junior College for their actions in depriving him, and for all others similarly situated of his constitutional rights. The Plaintiff alleged that they acted under the color of state law and such grounds for this suit are to be found in the Plaintiff's Original Complaint and the case law in support of the Complaint is to be found in Plaintiff's brief which was submitted to the court in defense of said complaint.

WHEREFORE, Plaintiffs having pleaded their right to sue Defendant Board of Regents of Odessa Junior College as aforesaid, they pray the Court refuse the aforesaid Defendant's motion to dismiss.

LAW OFFICES OF BURNETT AND CHILDS
Box 3707
Odessa, Texas

by Richard J. Clarkson
Richard J. Clarkson
ATTORNEYS FOR THE PLAINTIFFS

NOTE: Portion of Record Omitted—Filed in its Original Form

—0—

MOTION FOR LEAVE TO AMEND PLEADINGS

(Number and Title Omitted. Filed: Jul 31, 1969)

TO THE HONORABLE COURT:

Plaintiff moves under Rule 15, Federal Rules of Civil Procedure, for leave of Court to file First Amended Complaint.

This Motion is not for purposes of delay, but that justice may be had by stating all elements of complaint that Plaintiff feels are basis for his request for permanent reinstatement on the faculty of Odessa Junior College.

Respectively submitted:

BURNETT & CHILDS
P. O. Box 3707
Odessa, Texas

By: s/ Richard J. Clarkson
Richard J. Clarkson
ATTORNEY FOR PLAINTIFFS

NOTE: Portion of Record Omitted—Filed in its Original Form.

—0—

ORDER GRANTING PLAINTIFF LEAVE TO AMEND COMPLAINT

(Number and Title Omitted. Filed: Jul 31, 1969)

Leave of Court is hereby granted Plaintiff to file their First Amended Complaint.

SO ORDERED, this, the 31st day of July, 1969.

s/ Ernest Guinn

UNITED STATES DISTRICT JUDGE

—0—

PLAINTIFF'S FIRST ORIGINAL AMENDED COMPLAINT

(Number and Title Omitted. Filed: Jul 31, 1969)

NOW COMES the Plaintiff, through his attorneys, Warren Burnett and Richard J. Clarkson, and as and for a cause of action, on behalf of himself and on behalf of all who are similarly situated, and against the Defendants, alleges the following:

I.

That this Court has jurisdiction in this cause over all parties under 42 U.S.C., Sec. 1983, and 28 U.S.C., Sec. 1343.

II.

That the Plaintiff, ROBERT P. SINDERMANN, is a citizen of the United States and a resident of Odessa, Ector County, Texas.

III.

That the Defendants, CHARLES R. PERRY, WILLIAM L. PETTIT, GUY ELLIOTT, JAMES F. OCKER, BETTY DOOLEY, G. KIRK HARDING, R. C. MASON, OTTO PAVLICEK, JOE

C. ZANT, are citizens of the United States and residents of the City of Odessa, Ector County, Texas, and can be served with process at the following addresses:

Charles R. Perry
Peters & Fields Building
800 Central Drive
Odessa, Texas

William L. Pettit
2326 Field
Odessa, Texas

Guy Elliott
2500 E. 8th Street
Odessa, Texas

James F. Ocker
2709 Fair Oaks
Odessa, Texas

Betty Dooley
2926 Chisum
Odessa, Texas

G. Kirk Harding
5003 Kingston
Odessa, Texas

R. C. Mason
1415 Emerald
Odessa, Texas

Otto Pavlicek
2318 N. Grant
Odessa, Texas

Joe C. Zant
J. C. Zant Engineering Co.
Country Club Estates
Odessa, Texas

IV.

That the Defendant, Board of Regents of Odessa Junior College is a body corporate duly organized and existing under the general laws of the State of Texas, having the power to sue and to be sued in its corporate capacity, Vernon's Annotated Civil Statutes of Texas, Art. 2815h, Sec. 20, which governs and manages the branch of higher education in the State of Texas known as Odessa Junior College, and may be served by serving Charles R. Perry, President of said Board of Regents, at Peters and Fields Building, 800 Central Drive, Odessa, Texas.

V.

That the Defendant, Dr. Jack Rodgers, is President of Odessa Junior College, which college is located in Odessa, Texas, and that the said Dr. Jack Rodgers, by and through the authority delegated to him by the Defendant Board of Regents, directs, governs and manages the said college. Said Defendant, Jack Rodgers, may be served, both individually and in his capacity as President of said college, by process of service at his office at Odessa Junior College.

VI.

That the Plaintiff was retained by the Defendants as a lecturer to teach Government in the Department of Social Sciences at Odessa Junior College for the school year of 1968-1969, and the Plaintiff performed and continued to perform those duties pursuant to such retention.

VII.

That although Odessa Junior College has no tenure system, the Administration of the college ac-

knowledges the fact that faculty members have "permanent tenure" until the time that their contracts are not renewed. (cf. Appendix "A", page 3). That on October 16, 1967, the Coordinating Board of Texas College and University System adopted guiding principles designed to aid Texas colleges and universities in evaluating the conditions of academic freedom, tenure, and responsibility that prevail on each campus. The Plaintiff has tenure within the guiding principles established by the Coordinating Board, being a teacher in Texas' higher education institutions for ten (10) years, with four (4) of those years being at Odessa Junior College. (Cf. Appendix "B", page 1-2).

VIII.

That the Texas Coordinating Board's statement on academic freedom, tenure and responsibility was published in the bulletin of the American Association of University Professors with that organization's approbation. (Cf. Appendix "C").

IX.

That there have been campaigns in the Permian Basin (Midland-Odessa and surrounding areas) by the local citizenry in support of bills before the Texas Legislature to either elevate Odessa Junior College to a four-year status, or else to build a separate senior college in the Permian Basin. The Plaintiff has been vocal in his expressions of opinion in support of the movement to elevate Odessa College to a four-year status, and such expressions have been in opposition to the public position taken by the Defendant Board of Regents, and Defendant, Dr. Jack Rodgers. (See Appendix "A").

X.

That in a press release issued by the office of Defendant, Jack Rodgers, on May 13, 1969, it was stated that one of the reasons for not renewing the contract of the Plaintiff was his association with the "Committee to Elevate Odessa Junior College." (See Appendix "A").

XI.

That the Plaintiff is State President of the Texas Junior College Teachers' Association, and was invited to appear in that capacity before the Texas Senate's State Affairs Committee by State Senator Oscar Mauzy of Dallas, Texas, and the Chairman of the State Affairs Committee, William T. (Bill) Moore, on proposed academic freedom legislation. (Cf. Appendix "D").

XII.

That in a press release issued by the office of Defendant, Dr. Jack Rodgers, on May 13, 1969, that one of the reasons for the Plaintiff not being retained for the academic year 1969-1970 was his unauthorized trip to Austin, Texas, to testify without receiving the college Administrations' approval. (Cf. Appendx "A").

XIII.

That the Odessa College **Faculty Guide** states that the penalty to be exacted for any unauthorized absences on the part of faculty members is: "The employee shall have 1/180 of his annual salary deducted for each day of such absence not approved by the departmental chairman, the Dean of the College, or the President." This penalty was exacted for both absences. (Cf. Appendix "G", p. 53).

XIV.

That the criteria for retention of teaching personnel as found in the Odessa College Faculty Guide are in violation of the First and Fourteenth Amendments to the United States Constitution in that they are vague and overbroad. (Cf. Appendix "G", p. 54).

XV.

That the Plaintiff was required by the **Faculty Guide** of Odessa College to accept and observe criteria of public and private "conduct" acceptable to the community and to the college was a requirement of such vagueness and overbreadth as to deprive the Plaintiff of his First and Fourteenth Amendment rights under the United States Constitution. (Cf. Appendix "G", p. 54).

XVI.

That the Plaintiff was required to support the goals and objectives of the college once they had been set by the majority of the faculty, administration, and Board of Regents, and such requirement was in violation of the Plaintiff's First and Fourteenth Amendment rights under the United States Constitution. (Cf. Appendix "G", p. 54).

XVII.

That those reasons for the Plaintiff's contract not being renewed as found in paragraphs X and XII above are the only ascertainable reasons for such action by the Defendants, no formal charges having been sent to the Plaintiff by said Defendants, are in nowise sufficient cause for the dismissal of a faculty member with tenure as established by the Coordinating Board of Texas College and University Sys-

tem, in its statement of October 16, 1967, namely:

"Professional incompetence, moral turpitude, or gross neglect of professional responsibilities." (Cf. Appendix "B"; page 2).

XVIII.

That ten members of the faculty of the Social Science Department of Odessa Junior College signed a statement attesting to the fact that the Plaintiff is a totally competent person professionally, and that nothing he has said or done has, in any way, derogated from his competence in the classroom as a lecturer in Government at the college. This is all but a few members of his Department. (Cf. Appendix "E").

XIX.

That the Plaintiff was advised on May 19, 1969, by the Defendant, Dr. Jack Rodgers, purporting to act under due authority, that his contract would not be renewed for the year 1969-1970. (Cf. Appendix "F").

XX.

That the Defendants or their agents, refused to give any reasons to the Plaintiff for their decision to not retain him as a member of Odessa Junior College faculty for the school year 1969-1970, and also that the Defendants did not offer the Plaintiff an impartial hearing into the merits of such decision.

XXI.

That the reason for such decision by the Defendants, or their agents, was to retaliate against the Plaintiff for the Plaintiff's expressions of opinion.

XXII.

That the Defendants' decision not to retain the Plaintiff was not based upon good faith on their part.

XXIII.

That the decision of the Defendants is a denial, a violation, a restraint, and a deprivation of the Plaintiff's rights to free speech under the United States Constitution.

XXIV.

That the decision of the Defendants was not made under ascertainable and definite standards governing the Defendants in making this decision.

XXV.

That the Defendants, or their agents, have intimidated and harassed the Plaintiff and other Odessa Junior College faculty members similarly situated because the Plaintiff and those so situated have exercised their right to free speech in a way critical of the Defendants.

XXVI.

That the conduct of the Defendants has caused, and unless such decision is restrained from enforcement, will cause the Plaintiff damages to his professional reputation and standing for which there is no adequate remedy at law.

XXVII.

That such decision of the Defendants has already caused the Plaintiff to suffer actual damages to his reputation, to his ability to obtain similar employment in other colleges in the State of Texas, damages in the amount of Two Hundred Seventy-Five Thousand Dollars ($275,000.00).

XXVIII.

That such decision of the Defendants was retaliatory in nature and not based upon good faith, and that they, therefore, should be liable for punitive damages in the amount of Two Hundred Thousand Dollars ($200,000.00).

XIX.

That because the actions of the Defendants necessitated that the Plaintiff retain attorneys in order to obtain his United States Constitutional rights, the Defendants should be held liable for reasonable attorneys' fees.

XXX.

That the Plaintiff brings this action on behalf of himself, on behalf of many of the Odessa Junior College faculty members too numerous to join herein, who have been intimidated and harassed by the Defendants, or their agents, for expressing their opinions, and on behalf of many Odessa Junior College faculty members too numerous to join herein, who have become fearful and reluctant to express their opinions because of the conduct of the Defendants as described herein.

WHEREFORE, the Plaintiff demands the following relief:

(1) A judgment that the decision of the Defendants that the Plaintiff not be retained as a member of the Odessa Junior College faculty for the school year 1969-1970, is in violation of the Plaintiff's rights, and in violation of the rights of those similarly situated, under the First and Fourteenth Amendments to the United States Constitution.

(2) That the Defendants are to grant to the Plaintiff a hearing on the reasons for his dismissal in substantial compliance with the recommendations set out by the Coordinating Board, Texas College and University System, as contained in the attached Appendix "B", namely: The Defendants should give formally written charges to the Plaintiff. Presentation of such charges should provide for (a) a written response to the charges by the faculty member, if he wishes a hearing; (b) Opportunity by the faculty member to exercise his right to be represented by counsel of his own choosing, to have a hearing before a regularly elected faculty committee, to confront and cross-examine witnesses, to know the name and statement of a witness who, for extraordinary reasons, does not appear at the hearing, to respond orally to charges made against him, to have findings and recommendations made on each of the charges, and to be given a complete transcript of the hearing, including the findings of the faculty committee; (c) a review of the case, if essential, by an appropriate reviewing body—the review to include the findings and recommendations of the hearing committee, the opportunity of the faculty member and University representative for oral argument, the return of the proceeding to the hearing committee, if the original recommendations are not sustained, the study of the hearing committee's reconsidered findings and recommendations, and a rendering of a final decision (which should be written in the rare case in whch the hearing committee is overruled).

(3) A judgment that the failure of the Defendants to provide the Plaintiff with an impartial

hearing as to the merits of their decision of May 6, 1969, was arbitrary, capricious, and contrary to the Plaintiff's rights, and the rights of those similarly situated, under the First, Fifth and Fourteenth Amendments to the United States Constitution.

(4) A judgment that the refusal of the Defendants to give reasons for their decision was arbitrary, capricious, and in violation of the rights of Plaintiff and those similarly situated, under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

(5) A judgment that the failure of the Defendants to make such decision under ascertainable and finite standards was arbitrary, capricious, and in violation of the rights of Plaintiff and those similarly situated, under the First, Fifth and Fourteenth Amendments to the United States Constitution.

(6) An order of the Court directing the Defendants to retain the Plaintiff in his position as a member of the Odessa Junior College faculty for the year 1969-1970, at the same level of responsibility and function as per the retention for the school year 1968-1969.

(7) That a date be set on the court's docket for a trial on the damages alleged in this complaint, and

(8) for such other and further relief as may be equitable.

LAW OFFICES OF BURNETT &
CHILDS
P. O. Box 3707
ODESSA, TEXAS

By: s/ Richard J. Clarkson
RICHARD J. CLARKSON
ATTORNEYS FOR THE PLAINTIFF

PLAINTIFF DEMANDS TRIAL BY JURY

NOTE: APPENDIX A through F omitted; heretofore copied on pages 13 through 41.

* * * * *

—0—

AFFIDAVIT IN SUPPORT OF APPENDICES A, B, C, D, E, F, AND G OF PLAINTIFF'S FIRST AMENDED COMPLAINT

(Number and Title Omitted. Filed: Jul 31, 1969)

ROBERT P. SINDERMANN, being first duly sworn, on Oath deposes and presents the following:

1.

That he is the Plaintiff in the hereinabove styled case.

2.

That Appendix A of Plaintiff's First Amended Complaint is a true and exact copy of a press release issued by the office of Defendant, Dr. Jack Rodgers, of May 13, 1969.

3.

That Appendix B of Plaintiff's First Amended Complaint is a true and exact copy of the Coordinating Board Texas College and University System's Policy Paper Number One, dealing with its guideline concerning academic freedom, tenure, and responsibility.

4.

That Appendix C of Plaintiff's First Amended Original Complaint is a true and exact copy of the American Association of University Professors Republication of the Texas Coordinating Board's statement on academic freedom, tenure, and responsibility.

5.

That Appendix D of Plaintiff's First Amended Original Complaint is a true and exact copy of a telegram sent to the Plaintiff by Texas Senator Oscar Mouzy; and a letter sent to the Plaintiff by Texas State Senator Bill Moore; and a letter sent to Plaintiff by Texas State Senator Oscar Mouzy.

6.

That Appendix E of Plaintiff's First Amended Original Complaint is a true and exact copy of an attestation as to the professional competency of the Plaintiff signed by ten members of the Social Science Department of Odessa Junior College.

7.

That Appendix F of Plaintiff's First Amended Original Complaint is a true and exact copy of the letter sent to Plaintiff by Defendant Dr. Jack Rodgers, announcing that the Plaintiff's contract would no be renewed with the college.

8.

That Appendix G of Plaintiff's First Amended Original Complaint is a true and exact copy of Odessa College's **Faculty Guide.**

9.

That the Plaintiff knows of his own personal knowledge that the above referred to appendices are true and exact copies of what they purport to be.

10.

That this affidavit is made in support of the Appendices A through G which are attached to the Plaintiff's First Amended Original Complaint.

s/ Robert P. Sinderman

THE STATE OF TEXAS)
)
COUNTY OF ECTOR)

Subscribed and sworn to before me the undersigned authority on the 28th day of July, 1969.

s/ Sarah Lewallen

Sarah Lewallen, Notary Public in and for Ector County, Texas
My commission expires June, 1971.

—0—

NOTE: Portion of Record Omitted—
Filed in its Original Form

* * * * *

—0—

MOTION OPPOSING DEFENDANT BOARD OF REGENTS', BOTH INDIVIDUALLY AND OFFICIALLY, AND DR. JACK RODGERS', BOTH INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF PLAINTIFF'S MOTION

(Number and Title Omitted. Filed: Aug. 1, 1969)

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Robert P. Sindermann as above captioned moves the Court to refuse the Defendants' motion for Summary Judgment and would show the Court as follows:

1.

Plaintiff sued the Defendants for their actions in depriving him, and for all others similarly situated, of his constitutional rights. Plaintiff alleged that they acted under the color of state law and such grounds for this suit are to be found in the Plaintiff's First Amended Complaint and the case law in support of the Complaint is to be found in Plaintiff's brief which was submitted to the Court in defense of said Complaint.

2.

The pleadings and affidavit on file conclusively show that there are justiciable issues of fact in this case, and that the Defendants are not entitled to judgment as a matter of law.

3.

The fact issues that are before this Court are numerous:

(1) Was one of the reasons that the Plaintiff's contract was not renewed, his association with the "Committee to Elevate Odessa Junior College" (Paragraph X of Plaintiff's First Amended Complaint)?

(2) Have any actions on the part of the Plaintiff interfered with his effectiveness in the classroom (Paragraph XVIII of Plaintiff's First Amended Complaint)?

(3) Was the reason that the Defendants did not renew the Plaintiff's contract one motivated by a desire to retaliate for the Plaintiff's political activities (Paragraph XXI of Plaintiff's First Amended Complaint)?

(4) Was the Defendants decision not to renew the contract of the Plaintiff based upon a lack of good faith on their part (Paragraph XXII of Plaintiff's First Amended Complaint)?

(5) Was there any indication in the **Faculty Guide** or otherwise that would indicate to the Plaintiff that his two unauthorized absences could be the basis of the nonrenewal of his contract (paragraphs XXIV and XIII of Plaintiff's First Amended Complaint)?

(6) Have the Defendants or their agents so acted as to intimidate the Plaintiff and other Odessa Junior College faculty members similarly situated so as to deprive them of their constitutional rights to free speech (Paragraphs XXV and XXVI of Plaintiff's First Amended Complaint)?

WHEREFORE, Plaintiffs having pleaded and shown fact issues of constitutional dimensions which are to be in large part, determinative of Plaintiff's

right to reinstatement on the faculty of Odessa Junior College, they pray the Court refuse the aforesaid Defendants' motion for Summary Judgment.

Respectfully submitted,

LAW OFFICES OF BURNETT & CHILDS
P. O. Box 3707
Odessa, Texas 79760

By: s/ Richard J. Clarkson
RICHARD J. CLARKSON
ATTORNEYS FOR PLAINTIFFS

NOTE: Portion of Record Omitted—
Filed in its Original Form

* * * * *

—0—

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted. Filed: Aug 4, 1969)

Came on to be considered the Defendants' Motion to Dismiss the Defendant Board of Regents of Odessa Junior College, and the Court having considered same, is of the opinion that same should be DENIED, and it is so ORDERED.

Then came on to be considered by the Court the Motion for Summary Judgment, together with the exhibits and affidavits filed herein by the Defend-

ants, and the briefs filed herein by all parties in support of and against said Motion, and the Court having considered same is of the opinion that same is well taken for the following reasons, and so finds:

I.

Plaintiff's tenure of employment ended May 31, 1969.

II.

Odessa Junior College has no tenure system which fact was known to the Plaintiff at the time he entered into his original contract with the college.

III.

After the termination of his contract of employment the Defendant college owed no obligation to the Plaintiff.

I conclude:

I.

Plaintiff has no cause of action against the Defendants since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system.

II.

Plaintiff has no contract with the Defendant college.

III.

Plaintiff has no right which would require Defendants to execute a contract with Plaintiff, or to employ Plaintiff.

IV.

Defendants have not violated any constitutional rights of the Plaintiff.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by his suit and that the Defendants do recover their costs, for all of which let execution issue.

ENTERED THIS 4th day of August, 1969.

s/ Ernest Guinn
UNITED STATES DISTRICT JUDGE

—0—

NOTICE OF APPEAL

(Number and Title Omitted. Filed: Aug 15, 1969)

TO THE HONORABLE JUDGE OF SAID COURT.

Notice is hereby given that Robert P. Sindermann, Petitioner, above named, hereby appeals to the United States Court of Appeals for the 5th Circuit from the order granting Summary Judgment entered in this proceeding on the 4th day of August, 1969.

s/ Richard J. Clarkson
RICHARD J. CLARKSON

—0—

APPEAL BOND

(Number and Title Omitted. Filed: Aug 15, 1969)

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the Odessa Junior College Board of Regents and Dr. Jack Rodgers, President of Odessa Junior College, Defendants herein, the sum of TWO

HUNDRED AND FIFTY DOLLARS ($250.00), conditioned that,

WHEREAS, the Plaintiff appealed to the Court of Appeals for the 5th Circuit of Appeals by Notice of Appeal filed herein, from the Order of this Court sustaining the Defendants' Motion for Summary Judgment entered herein. The Plaintiff shall pay all costs adjudged against him if the appeal is dismissed or the Judgment affirmed, or such costs as the Appellate Court may award in the Judgment is modified, then this Bond is to be void, but if the Plaintiff fails to perform this condition, payment of the amount of this Bond shall be due forthwith.

LAW OFFICES BURNETT & CHILDS
P. O. Box 3707
Odessa, Texas 79760

By: s/ Richard J. Clarkson
RICHARD J. CLARKSON

UNITED STATES FIRE INSURANCE COMPANY

By s/ T. B. Harris, Jr.
Attorney in Fact

NOTE: Portion of Record Omitted—
Filed in its Original Form

—0—

CLERK'S CERTIFICATE

I, DAN W. BENEDICT, Clerk of the United States District Court in and for the Western District of Texas, do hereby certify that the foregoing numbered and listed pleadings, orders and instruments are all of the original papers, except for copies of the Civil Docket Sheets, filed and entered in Civil Action MO-69-CA-54, styled Robert P. Sindermann v. Charles R. Perry, et al, as the same appear on file and of record in this office.

I further certify that Items Nos. 20, 21 and 22 of Appellant's Designation of Contents, and being Affidavit in support of appendices "H" and "I", Motion and Order Granting Leave to Add Appendices "H" and "I" and Appendices "H" and "I" are not of record in this office and therefore are not included in this record.

WITNESS my official signature and seal of said District Court at the City of Pecos, Texas, this 26th day of August, 1969.
(SEAL)

DAN W. BENEDICT, Clerk of Court

By s/ James Drane
Deputy Clerk

APPENDIX "H"

Standards of The College Delegate Assembly

OF

THE SOUTHERN ASSOCIATION OF COLLEGES AND SCHOOLS

December, 4, 1968

A PUBLICATION OF THE
SOUTHERN ASSOCIATION OF COLLEGES AND SCHOOLS
795, Peachtree Street, N.E. Atlanta, Georgia 30308

For additional information write the Central Office.

STANDARDS OF THE COLLEGE DELEGATE ASSEMBLY OF THE SOUTHERN ASSOCIATION OF COLLEGES AND SCHOOLS

Principles and Philosophy of The College Delegate Assembly in Accreditation

The College Delegate Assembly of the Southern Association of Colleges and Schools is charged with the responsibility of accrediting institutions of higher learning in the southern region of the United States. This responsibility is exercised through the Commission on Colleges, which considers its principal concern in accreditation to be the improvement of educational quality in the institutions of the area it serves. It is also the responsibilty of the Commission to work with institutions of higher education in Latin America toward mutual understanding and educational cooperation.

The Commission on Colleges sees its task as intimately related to the traditional public philosophy of the United States—that free men can and ought to govern themselves, and that they do so best through a representative, flexible, and responsive system. Accordingly the Commission believes that accreditation with its controls and stimulation can be accomplished best through a voluntary association of non-profit educational institutions.

The Commission asserts the principle that regional accreditation is preferable to state or national because provincialism tends to threaten the smaller

unit, and a national organization may become unwieldly. The boundaries of the accrediting association should not be identified with political framework, either state or national. There are many problems to be shared at the regional level that might not be dealt with effectively in a state or nationwide association. This does not in any way limit the existing cooperation and exchange of ideas with the other regional associations which are largely parallel in aims and functions. The several regional associations in combination form an effective national system for the control and improvement of quality in higher education.

The Commission on Colleges is dedicated to a firm belief in the rights of a teacher to teach, investigate, and publish freely, and in the rights of students to the opportunity of learning. The rights of an institution to fulfill the purposes for which it was founded are held to be incontestable. Sometimes these rights seem to be in conflict; it is then that the Commission must attempt to bring into harmony the counterclaims to freedom of the individual, the institution, and society. The Commission also stands ready to protest in the name of academic integrity when the educational effort is hampered by political interference, or is in any way menaced by those who would subvert the search for truth.

With this general philosophy which affirms that accreditation should be based on mutual, voluntary assistance at a regional level in an atmosphere of academic freedom, the Commission on Colleges has developed after long experience certain criteria and procedures. The Commission consists of representatives elected by the College Delegate Assembly and

fulfills its functions through appropriate committees. Much of the labor of the Commission goes into establishing the qualitative and quantitative criteria against which an institution is evaluated to determine its effectiveness, and its acceptability in the academic world and the society of which it is a part.

As a basic principle, the Commission regards its function of accreditation as accrediting an institution as a whole. It recognizes that accreditation of professional schools, divisions, or departments within complex universities is also provided by other recognized accrediting organizations. Although it cooperates with these agencies for professional accreditation, the Commission retains the right and responsibility of assuring that the total program of a complex institution is coordinated, administered, and held in proper balance. Cooperation with professional agencies does not limit in any way the Commission's right to accredit the total institution. It becomes the responsibility of the Commission, furthermore, to evaluate the work of specialized schools, divisions, or departments when they are not accredited by the appropriate professional agencies.

The Standards which the Commission has developed apply to initial applications, to member institutions, and to the Institutional Self-Study Program. Ths statement of Principles and Philosophy of the College Delegate Assembly in Accreditation is considered not only as an introduction to the Standards, but is also of equal force with the eleven Standards.

With the exception of the Standard on Purpose, each Standard is presented in two parts. The statement of principles under each Standard can be

changed only by action of the College Delegate Assembly upon recommendation by the Commission on Colleges. The illustrative and interpretative material under each Standard applies to current situations and is subject to change by the Commission as evidence justifies. A change in illustrative and interpretative material will be effective after announcement to member institutions but will be taken to the College Delegate Assmbly only when that body requests a review of a specific change.

Meeting each Standard is not all that is required for accreditation by and membership in the Southern Association. Assuredly, the Commission is interested in qualifications of faculty, the state of academic freedom, library size, and numerous other educational factors in an institutional operation. It is finally concerned, however, with the totality of the effort, and the atmosphere in which it is carried on. The assessment of this totality overrides smaller considerations as the decision is approached whether or not to confer or to retain membership.

No institution should remain at the minimum level, for the educational endeavor is a dynamic process. A university or college improves and grows in strength or it declines. The Commission tries to foster in each member qualitative improvement. The method used in this effort is the Institutional Self-Study Program. Once in each ten-year period, member universities and colleges are required to make a comprehensive Self-Study which is to be evaluated at the institution by a qualified committee of educators. This is the procedure for reaffirmation of accreditation, but the primary purpose of these visits is the qualitative improvement of each member institu-

tion. The Commission is particularly concerned with the follow-up procedure and insists upon being kept informed as to progress resulting from the experience of self-study. It is hoped that the Self-Study will offer a method by which member institutions may appropriate for themselves the creative vision of their best and most devoted minds, supplemented by objective outside evaluators, thereby furnishing a stimulus to the continued self-development of the academic community.

The maintenance of Standards and participation in the Institutional Self-Study Program are the normal procedures expected of member institutions. The Commission, however, reserves the right to call upon its members from time to time for specific information that may be useful to the membership. It also insists upon the right, or even obligation, to make special studies or investigations of member institutions.

The Commission encourages member institutions to conduct experimental programs. If these programs are at variance with the Standards, the institution is expected to submit the program to the Executive Council of the Commission.

It is assumed that institutions joined in the work of this Commission admit the responsibility they have to each other and to their society. The Commission believes that its philosophy of accreditation logically precludes any attitude of exclusiveness. No institution asking for membership will be refused if it demonstrates its acceptability under the Standards of the Commission.

STANDARD ONE

Purpose

Each institution should clearly define its purpose and should incorporate this definition into a statement which is a pronouncement of its role in the educational world. The institution's integrity is measured not only in terms of its stated purpose, but also in terms of its conscientious endeavor to fulfill this purpose.

It is recognized that the membership consists of a diversity and variety of institutions, ranging from those which have a singleness of purpose to those which are highly complex, from those which are church related to those which are privately or publicly controlled. Each institution, however, should have a well developed and available statement of purpose, not only worthy of higher education in general but also appropriate for its specific educational role. This statement should be clear and concise, and should represent the official concept and practice of the institution.

The formulation of the statement of purpose is a major decision and basic changes should be made only after proper consideration and approval by the governing board. This should not be interpreted, however, as a denial of the right of the faculty to take the initiative in recommending changes. An institution should also examine its statement of purpose periodically. This re-evaluation should include the changes which have taken place internally as well as the changing responsibilities of the institution to its constituency.

All appropriate publications should reflect accurately the institution's statement of purpose. All in-

stitutional programs, including the programs outlined in the official publications, should be designed to achieve the stated purpose. The faculty, financial resources, physical plant, and educational program should be adequate and appropriate to meet the stated purpose of the institution.

STANDARD TWO

Organization and Administration

The administrative organization of an institution of higher learning should bring together its various resources and coordinate them effectively to accomplish its objectives. Although a similar pattern of organization for all member institutions is neither required nor expected, the organizational structure and the administrative processes should be well defined and understood by the entire college community.

The governing board, the term used in the Standards to apply to all governing bodies of institutions of higher education, is the legally constituted body representing the founders, the religious group, or the supporting governmental unit. Members of the governing board should be chosen because of their ability and willingness to serve the institution without selfish motives. The board acts as a body politic and no single member can act in place of the total board. Since the governing board holds institutions in trust, there should be a continuity in membership which will assure stability.

The responsibilities of the governing board include establishing broad institutional policies, securing financial resources to support adequately the institution's program, and selecting the chief administrative

officer and, upon his recommendation, the other administrative officers of the institution. The governing board should not be subject to undue pressures from state officials or other outside political or religious groups; furthermore, the governing board should protect the administration from similar outside pressures.

There should be a clear differentiation between the policy making functions of the governing board and the responsibility of those in charge of administering these policies. General institutional policies may originate within the board or be approved by the board upon the recommendation of the administration. Once these have become the policies of the governing board, the chief administrative officer should be free to implement such policies and to administer the institution within the broad policies laid down by the board.

In addition to the administrative head of the institution, there should be other administrative officials directly responsible to him. The duties of these officers should be well defined and known to the faculty and staff. An effective pattern of organization will contribute to the development of the institution and to general morale. Opportunities for adequate communications throughout the institution are highly important.

Illustrations and Interpretations

1. Descriptive Titles and Terms

The descriptive title as well as the organization of an institution should be appropriate to the purpose, the size, and the complexity of the institution. The indiscriminate use of "unversity" for "college", the

retention of descriptive terms in the title of the institution after the specific function has been dropped or relegated to minor position, or the overly ambitious title not justified by actual practice reflect unfavorably upon an institution. When an institution contemplates changing from a junior college to a senior college or moving to other higher degree levels, it must notify the Executive Secretary of the Commission on Colleges.

2. Governing Boards

Although it is recognized that the title and function of governing boards vary, there should be a clearly identifiable body which is granted and must assume the responsibility for policy. The duties and responsibilities of the board should be clearly defined in an available offical document. This document should also specify the number of members, length of service, rotation policies, organization and committee structure, frequency of meetings, and other pertinent information.

The board should be assured appropriate continuity and independence. Appropriate continuity is normally assured by express provisions for individual terms of adequate length, reasonably staggered; and for removal from office only for cause, by procedures involving due process, desirably by the board itself. The board's independence is normally assured by an expression or an established tradition that the board is independent of outside control in determining policy for the institution. In practice the board has the responsibility to exercise its independent judgment in matters of institutional policy, and should not permit itself to be subject to undue outside pressures.

3. By-Laws and Faculty Manuals

Published by-laws of the board and formalized faculty manuals are strongly recommended. These or similar official documents should contain the following information: the duties and responsibilities of chief administrative officers, the pattern of faculty organization, statements governing tenure and related procedures, and all other policies and regulations that affect the members of the faculty, the members of the administrative staff, or other college personnel.

4. Size of Institutions

Although there is no specific rule as to the minimum size of an institution to be admitted and retained in membership, the enrollment and economic resources should be sufficient to justify an effective educational unit.

5. Institutions as Units

When an institution is a unit of a public or private school system, the administration, management, financial and student accounting, and general operation must be such as to reflect clearly the autonomy of the institution as distinguished from the other units of the school system.

STANDARD THREE

Educational Program

The educational program must be clearly related to the purposes of the institution. This relationship between purpose and program must be demonstrated in policies of admission, content of curricula, requirements for graduation, instructional methods and procedures, and quality of work required of the students.

An institution should have a well-defined and clearly-expressed policy of admission. The admission policy should be related to the educational purpose of the institution and should establish such qualitative and quantitative standards and criteria as are necessary to insure the admission of students who can benefit from the educational program. The policy should require the completion of a secondary school curriculum that lays a sound foundation for a program within the institution.

The curricular offerings of an institution should be clearly and accurately described in published materials. Curricula should be directly related and appropriate to the purpose and objectives of the institution, to the ability and preparation of the students admitted, and to the financial and instructional resources of the institution.

The principal focus of the total institution should be on education of students. Instruction is the basic means to this end. Instructional techniques and policies should express the purposes of the institution, as well as the specific objectives of an individual course. Instruction, to be effective, must be evaluated continuously, and an institution should be able to present evidence that efforts are being made to improve instruction. Concern for improvement of instruction is a mark of institutional vitality.

Illustrations and Interpretations

1. Admission

The admission policy of an institution is usually and properly made at two levels of authority. General policy is established by the governing board normally on recommendation of the administration. The authority to decide the size and character of a stu-

dent body, for example, is the responsibility of the board which determines the overall policy of the total institution. Specific admission policy, however, should be the responsibility of the administration and the faculty, and the agency responsible for administering this policy should be clearly identified. In some cases this agency will be a single administrative officer, or a committee of administrative officers. In other cases the agency will be a committee of the faculty, or a combined committee of administrative officers and members of the faculty. In any case, this agency should be identifiable, recognized, and responsible.

In keeping with this statement of policy, there should be an institutional agency (or agencies in the case of multi-purpose universities which operate separate schools within the university) which properly will be responsible for establishing and maintaining the academic criteria for approved admission. In the case of multi-purpose universities which operate separate schools within the university there should be provision for institution-wide coordination of all admission policies.

The admission policies of an institution should be clearly expressed and openly published, and should explain both general and specific requirements and patterns of secondary school courses where specified.

Students admitted for the first time should have completed an accredited secondary school program which provides a foundation appropriate for college study. A course of study is a total program as well as a concentration in certain subject matter fields; therefore, the admissions agency should examine the applicant's secondary school record for evidence of

his ability to make satisfactory progress in the appropriate disciplines of the institution.

In most cases, completion of an accredited secondary school program means graduation with a diploma. In some cases, however, an admissions agency might justifiably accept a student upon the basis of some other criteria, as, for example, an unusually superior student who has advanced beyond his classmates or a more mature student who has received a reasonable equivalent of secondary preparation in an informal educational program. In all such cases, however, the admissions agency must accept the responsibility of justifying its decision for each acceptance.

The policy with regard to accepting transfer credit should be clearly defined. The quality of work for transferred credits should be in keeping with the quality required of all students of the institution. The student transferring should be officially informed at the time of his admission exactly as to the status of his advanced standing.

The Commission encourages institutions to develop experimental programs for advanced and talented students. If these experiments represent radical departures from the Standards of the Commission, they must be reported to the Executive Secretary of the Commission.

There should be a definite and clearly defined policy regarding readmission of students dismissed or suspended from the college for academic reasons. The readmission of students dismissed under this policy should be consistent with the recognized academic standards of the admissions agency and of the total institution.

There must be a definite procedure in the adminis-

tration of admission policy which shall be followed in the admission of all students. All pertinent documents should be on file and examined by the proper admissions agency before a student is admitted. These documents must include academic records and such other information as is necessary to enable the institution to select students consistent with its admission policy.

It is the responsibility of the institution to assure that its recruiting activities and materials portray the institution accurately and honestly.

Procedures for financial aid and scholarships should be carefully developed and administered in accordance with a consistent policy.

2. Curriculum

There should be a clearly defined process by which the curriculum is established and controlled. This process should recognize the various roles of the governing board, the administration, and the faculty.

The determination of general policy is the responsibility of the governing board. Such matters as the number and types of degrees, the number and nature of the schools or colleges through which the curriculum is administered, and the extent to which the institution should offer graduate work are clearly areas over which the governing board has final jurisdiction. The implementation of the general policy and the determination of specific academic details are the responsibility of the administration and the faculty.

In a single-purpose institution responsibility for curriculum control and administration should be as-

signed to a committee of the faculty and administrative officials. A multi-purpose university might have an agency for each school or college, but should establish a single coordinating agency at the university level. In every case, areas of jurisdiction should be defined, with the channels of communication and control clearly established.

The scope and nature of the curriculum should be related to the stated purposes of the institution and in keeping with the available resources, both financial and academic. Definite efforts should be made to avoid the proliferation of course offerings and degree programs. A small institution with limited resources should not offer a wide variety of major programs and degrees. There should be in each undergraduate school a recognizable common core of subject matter that expresses the educational philosophy of the institution.

In each degree program there should be an orderly and identifiable sequence of courses with an adequate number of hours required in courses above the elementary level and with an appropriate system of prerequisites. The institution should define clearly what is meant by a major or a field of concentration, with stated minimums and maximums of hours required. There should be limitations on the number of hours allowed in specialized areas. These limitations should be related to the degree programs involved. Provision should be made for electives at least at the advanced levels.

The catalog and other published materials concerning institutional offerings should accurately and honestly reflect the academic resources of the institution.

3. Instruction

Effective instruction depends largely upon the general environment in the institution. This environment should be conducive to study and learning. Extra-curricular activities should provide a balance for student life, but should not be allowed to distract the student from his academic pursuits. An institution of higher education should endeavor to create a climate of intellectual curiosity and achievements among its students. The faculty and administration should be able to provide evidence of concern for the general setting in which learning is expected to take place. Such evidence should include efforts to provide for the professional growth of the faculty, provision for extra-curricular seminars and lectures, and other means of creating a stimulating environment.

Programs and courses should be supported by adequate library holdings, instructional materials, and physical facilities. Efficient use of such resources is an indication of concern for effective instruction. It is not enough to show that library, laboratory, and other facilities exist. It should also be possible to demonstrate that they are used effectively in the instructional process.

Instruction should be related to the objectives of each course, the capabilities of the students, and the general institutional standards of quality. The process of instruction should be organized so that students have a clear idea of the aims and the requirements of each course, and the methods of evaluation employed. Experimentation with devices and techniques in the improvement of instruction should be encouraged, but should be subject to critical analysis.

Evaluation of instruction should be related to subject matter, course objectives, and the program of studies. The effectiveness of instruction should be under continuous study. Examinations should be developed with care, and variety in types of measurements should be encouraged. Attempts should be made to evaluate the longer and more general effects of instruction by such devices as comprehensive examinations, the following up of graduates in more advanced programs, the sampling of the opinions of former students, and the use of standardized tests.

Effective instruction is related to class size, the instructional load, and the nature of the course. The size of classes should be governed by the nature and purpose of the course, the adequacy of teaching facilities, the competencies of the teaching staff, and the characteristics of the students involved, as well as the cost of the program. In cases of large classes, appropriate provision should be made for instructional assistance, the division of classes into small sections

meeting at different times, individual conferences, or other devices.

The operating budget of an institution should reflect its concern with instruction. One measure of the quality of the educational program is the proportion of the budget that is allocated directly to instruction.

Since they are definitely related to the effectiveness of instruction, the following sections under the Standard on Faculty should be considered as a part of the evaluation of instruction: academic preparation of faculty, professional growth, teaching loads, and promotions in rank.

STANDARD FOUR

Financial Resources

The financial resources of a college or university determine, in part, the quality of its educational program. Conversely, the quality of the educational program affects the ability of an institution to increase its financial resources. The adequacy of the financial resources of an institution is to be judged in relation to the basic purposes of the institution, the scope of its program, and the number of its students.

The organization of the business structure and the control of financial resources should always reflect the fact that financial resources are tools of the educational enterprise, never the reverse. The business management of an institution should exhibit sound

budgeting and control, proper records, reporting, and auditing.

Financial planning for the future within each educational institution is a condition of wisely guided development. Planning should include specific projections of income from each source, specific plans for major categories of expenditure, and plans for the increase of capital resources.

Illustrations and Interpretations

1. Sources of Income

The sources of income for educational institutions are subject to variation with the fluctuations of the economy. State appropriations, appropriations from other supporting bodies, such as, churches, annual giving, tuition and fees charged to students, and income from endowment are each subject to fluctuation. Private and church-related institutions should have a history of diversity of sources of income in order to indicate stability. Each institution should give evidence of the cultivation and utilization of each source of income so that the combination is adequate to its needs.

Endowments are highly important to non-tax supported institutions. Although income from endowment is subject to change with fluctuations in the economy, an institution having available income from this source strengthens the base of stability.

2. Stability of Income

Both public and private colleges shall exhibit stability of income as measured by at least three years'

history. The amount shall be measured as income per student rather than in terms of gross amount of income.

3. Organization for the Proper Administration of Financial Resources

All business and financial functions of the institution should be centralized, preferably under a single business officer responsible to the president. The more important functions which should be performed by the chief business officer and his staff include assistance to the president in the preparation of the institutional budget, control of the budget, the establishment and operation of an appropriate system of accounting and financial reporting, the supervision of the operation and maintenance of physical plant, the procurement of supplies and equipment, the control of inventories, the financial management of auxiliary enterprises, and the receipt, custody, and disbursement of funds belonging to the institution. In accordance with policies carefully developed by the board of control, the endowment funds and other investments should be administered by an appropriate officer or committee designated by that board. On all of these matters the president should report regularly to the governing board.

The chief business officer should be appointed by the governing board, upon the nomination of the president of the institution. Because of the numerous and varied responsibilities centered in the business

office, selection of this officer is an important factor in the effective business management of the institution. He should be a well educated person, experienced in handling educational business affairs. He should realize that the purpose of his office is to serve the institution and to assist in the furtherance of its educational program.

There should be a well conceived organization plan assigning responsibilities of the various activities which together comprise the business office of the institution. The complexity of the required organization will depend upon the size of the institution and the volume of transactions of a business or a financial nature.

The chief business officer should be one of the principal administrative officers, along with those in charge of academic administration.

4. Educational Expenditures

In judging the adequacy of financial operations, basic educational and general expenditures shall be used. These expenditures will include, for the fiscal year, general administration and general expense, instruction and departmental research, libraries, and operation and maintenance of the physical plant. In computing the expenditure per student, the total basic educational and general expenditure is divided by the number of equivalent fulltime students at the close of registration of the fall term.

The minimum expenditure, based upon the highest degree offered and the full-time equivalent enrollment of the institution, shall be as follows:

Level of Offerings and Enrollment	Minimum Expenditures
Junior Colleges and Other Two-Year Institutions	
0-200	$145,000
201-500	$145,000 plus $675 for every student in excess of 200
501-1000	$347,500 plus $575 for every student in excess of 500
1001 & Over	$635,000 plus $475 for every student in excess of 1000
Bachelor's Level Institutions	
0-200	$270,000
201-500	$270,000 plus $1150 for every student in excess of 200
501-1000	$615,000 plus $1000 for every student in excess of 500
1001 & Over	$1,115,000 plus $850 for every student in excess of 1000
Master's Level Institutions	
0-200	$300,000
201-500	$300,000 plus $1200 for every student in excess of 200
501-1000	$660,000 plus $1050 for every student in excess of 500
1001 & Over	$1,185,000 plus $900 for every student in excess of 1000
Doctor's Level Institutions	
0-200	$350,000
201-500	$350,000 plus $1300 for every student in excess of 200
501-1000	$740,000 plus $1150 for every student in excess of 500
1001 & Over	$1,315,000 plus $1000 for every student in excess of 1000

5. Budget Preparation

The budget is a statement of estimated income and expenditures for a fixed period of time, usually the fiscal year of the institution. The budget expresses in terms of dollars the educational program of the institution. Regardless of the size of the institution, an annual budget in appropriate detail is essential to proper operations. Since the annual budget is an expression of an educational program, its preparation and execution must be preceded by educational planning. It follows then that the instructional budget, for the most part, should be recommended by academic officers or deans, working closely with department heads and appropriate members of the faculty. Similarly, for other budget areas, recommendations should be made by the appropriate officers of the institution. The business officer assists in assembling and compiling the budget requests, prepares income estimates, and serves as a chief adviser to the president in the financial determination of budgetary allocations. The budget is presented by the president to the trustees for final approval. The review by the trustees should generally be limited to matters of broad policy and not matters involved with details. Preferably, forms should be devised by the institution which are used for the preparation of the budget and are made available to the various divisions of the institution which participate in the budget-making process.

6. Budget Control

After the budget has been approved by the president and adopted by the governing board, there should be a system of control. It is only in this way that plans of the governing board and the president

with respect to the budget may be carried out, and it is only in this way that the institution can operate according to a preconceived plan. Periodically, the accounting officer should render interim budget statements to department heads for their guidance and assistance in staying within budgetary allocations. Budgetary control is an administrative function, not a board function.

7. The Relation of an Institution to External Budgetary Control

An educational institution can neither conduct a sound educational program if its operational procedures are set by legslative act, nor can it be properly administered if an agency outside the institution exercises undue and restrictive financial control. Once funds have been appropriated for an institution (either for building construction or operations) budget making, establishing priorities, and control of expenditures should be entirely within the institution under the jurisdiction of the governing board subject to general policy provisions enacted by the legislature and to the commitments represented through budgetary requests by the institution. State financial and administrative officials adversely affect the educational and academic process when they exercise specific and detailed control over matters which can and should be handled within the institution. Recognition by educational representatives of the responsibility of state officials for the post audit function and the general enforcement of reasonable budgetary law is imperative; however, the educational function of an institution must not be controlled through the use of budgetary techniques or controls by financial officials outside the institution.

8. Accounting, Reporting, and Auditing

The accounting system should follow the generally accepted principles of institutional accounting as they appear in Volume I, **College and University Business Administration,** published by The American Council on Education. An essential principle of the system of accounting is that the information derived therefrom can be reliably compared with information obtained from the records of other institutions. Desirable uniformity in reports can be approached through the establishment of uniform classifications as recommended in this volume.

The financial statement is a logical extension of the accounting system. If the accounting records are adequate, the preparation of the financial statement is a matter of reclassifying the information supplied by the books of record. Periodic written financial reports to the president are necessary for both the large and the small institution.

An annual audit with a certified report shall be made by competent accountants who are not directly connected with the institution. The accountants should be selected at least partially on the basis of their experience and knowledge of institutional accounting.

Complementing the accounting system and the external audit, there should be a well organized program of internal audit and control.

9. The Management of Income

There should be a suitable organization and adequate procedures for the management of all funds belonging to or owed to the institution. Normally, the cashiering function should be centralized in the business office and there should be a carefully work-

ed out system for the receipt, deposit, and safe-guarding of institutional funds. All persons handling institutional funds should be bonded.

10. Purchasing and Control of Storerooms

For the institution which is large enough to justify a separate office for purchasing, as well as for the institution which is so small that its buying can be done by the chief business officer, it is essential to efficient operations that purchasing be done centrally. A logical adjunct of the purchasing function is a system of well organized storerooms, such as those for physical plant supplies, library supplies, and office supplies. It is advisable that there be established an inventory system on all of the equipment owned by the institution.

STANDARD FIVE

Faculty

The selection, development, and retention of a competent faculty at all academic levels is of major importance to all institutions. The relationship between faculty objectives and institutional purposes determines in large measure the effectiveness of the total educational program. The institution should make known its purposes and objectives to prospective faculty members, as well as its expectations of them. This should be done in order that objectives sought by the faculty will be in harmony with the institutional purposes.

Provision should be made for adequate faculty participation in the development of academic policies. The organization should provide regular and open channels of communication among faculty and between faculty and administration, and should be broadly representative of the faculty as a whole.

The academic preparation and experience of the faculty are significant factors in determining the quality of a college or university and should be such as to further the purposes of the institution. The continuous professional growth of all members of the faculty should be encouraged, and the institution should assist members of the faculty to further their professional development.

If faculty members are to be effective teachers, they must have reasonable security. The institution should, therefore, provide faculty members with adequate salaries and a well planned program of benefits to enable them to live in dignity and comfort. The institution should provide salaries and benefits sufficient to enable it to attract and retain a faculty commensurate with the achievement of the institutional purposes. The faculty salaries and the program of benefits should be regularly and frequently re-examined to keep them current with changing economic and social conditions. The institution should further implement the security of the faculty with policies and procedures providing faculty tenure and safeguards for academic freedom.

The total responsibility of each member of the faculty to the institution should be determined in such a way that he can make his maximum contribution toward carrying out the purposes of the institution and, at the same time, enhance his own professional development.

In the final analysis, the performance of the faculty determines the academic quality of the institution. Each institution should provide for continuing evaluation of faculty performance and for equitable recognition of faculty effectiveness.

Illustrations and Interpretations

1. Recruitment and Selection

Specific assignments of responsibility should exist for identifyng, appraising, negotiating with, and selecting new faculty members. Criteria for prospective faculty members should be established which are consonant with the purposes of the institution and with continuous advancement in the academic quality of the institution. These criteria should reflect appropriate minimums of previous preparation and experience for the duties to be undertaken.

The institution should make an active and painstaking search for suitable faculty members and provide for adequate travel and other investigative expense for the appropriate officials. The search should include accumulation of ample information on each candidate considered.

Final authority for approval and selection of faculty members may vary widely, but the selection process should accord adequate weight to recommendations of various officials held responsible for the academic program. Ordinarily, selection should be made after appropriate interviews with the candidate.

The institution should make periodic evaluations of its recruitment and selection procedures and policies, and utilize the findings of such evaluations to modify institutional policies and conditions of faculty employment. The faculty salary scale should be flexible enough to permit employment and retention of individuals needed to upgrade the faculty.

2. Faculty Organization

The faculty of all institutions should be so organized that their business may be properly conducted. Faculty membership should be clearly defined.

In small institutions the faculty should be organized as a whole, but in complex institutions it may be by divisions, schools, or colleges. In complex institutions there should be an organization such as a senate or council which meets regularly, in order that the faculty may have an opportunity to deal with the academic concerns of the total institution.

The jurisdiction of the faculty in academic affairs should be clearly defined and should provide adequate scope for the exercise of faculty responsibility. The faculty should be concerned primarily with fundamental academic policies.

Provisions for open and regular channels of communication between faculties and administration should be established.

The rules and regulations relating to faculty organization, by-laws, and responsibilities should be recorded and accessible to all concerned.

3. Academic Preparation of Faculty

All teaching faculty members should have advanced degrees (master's degree specialization in the fields in which they teach). Any exception must be justified by special competence in the field of knowledge.

In all colleges at least forty per cent of the teaching faculty should possess professional preparation equivalent to two years of advanced study beyond the bachelor's degree. In senior colleges at least sixty

per cent of the teaching faculty should possess professional preparation equivalent to three years of advanced study beyond the bachelor's degree and at least thirty per cent should hold the earned doctor's degree.

In junior colleges in any department composed of as many as four faculty members, at least one should possess professional preparation equivalent to three years of advanced study beyond the bachelor's degree. In senior colleges in any department or division composed of four or more faculty members, at least twenty-five per cent should have an earned doctorate. In any department or division offering a major or field of concentration, at least one member or twenty-five per cent, whichever is greater, should hold the earned doctorate in the area of concentration.

In the creative or applied arts or in any highly specialized professional or technical field, evidence of professional competency in the area of specialization is recognized and may be acceptable in lieu of advanced degrees.

The experience of the faculty within the institution should be such that it reveals a balanced total distribution among various accomplishments, as they relate to the objectives of the institution. Included among these should be successful teaching as evidenced by student accomplishment measured by data derived from examination or test scores, success in graduate schools, or similar sources; productive scholarship and research; effective participation in professional associations and scholarly societies; and contributions to improvement of the educational program of the institution.

4. Professional Growth

The academic environment of a college or university and the continuous professional growth of its faculty are inextricably bound together. The administration and the faculty should cooperate in providing opportunity for this professional growth. The institution should encourage professional development by affording opportunities, such as, leaves of absence for study and research, research facilities, membership in professional organizations, attendance at professional meetings and workshops, and inservice training. The general tone of the institution should be one in which the individual faculty member is expected and encouraged to exercise initiative in identifying and meeting his own professional growth needs.

5. Financial Security

Providing faculty salaries which reflect the importance and worth of college teaching in American society should always be an institutional goal. The salary scale should show steady progress toward this goal. In addition, the institution should have as an immediate goal the establishing of a salary structure which will place it in a reasonably competitive relationship to other colleges and universities. Intensive effort should be made to improve the salary structure if it is short of this immediate goal.

A program of benefits, including a sound retirement plan in which the institution participates and which protects the faculty members' equity, should be maintained.

Any institution in which faculty salaries are substantially below the average of comparable institu-

tions must show that steps are being taken to improve its salary scale; otherwise, it must explain this discrepancy. An institution may wish to determine these averages from national publications, such as, **Higher Education: Planning and Management Data,** published annually by the Office of Education of the U. S. Department of Health, Education, and Welfare, or from statistics which the Commission may be able to supply.

6. Tenure and Academic Freedom

Tenure regulations for an institution should be established by the governing board in accordance with generally accepted practices and should be clearly stated in writing to the faculty. Each faculty member should be given written notice when he achieves tenure under the institution's policies. Retention of a faculty member who has not been given tenure calls for special justification.

The policies and procedures for the termination of appointments should be stated in writing and should be in accord with commonly accepted practices. Termination of non-tenure members of the teaching staff should be made only after adequate notice has been given. Termination of the appointments of those members of the staff with tenure should be made only for cause, and the individual should be fully protected with the proper safeguards.

The institution should adopt and record a statement of the principles of academic freedom to which it subscribes, and within these principles faculty members should be secure in their freedom of teaching and investigation and in their right to partcipate as responsible citizens in community activities. Nothing in this statement of principles is intended to

protect an incompetent or negligent faculty member or to prevent the institution from making proper efforts to evaluate the work of each instructor. The tone of the institution, however, should be conducive of high faculty morale and a strong sense of faculty freedom and initiative.

7. Teaching Loads

The components of the work load of faculty members, and the relative weights assigned to each component, will vary from institution to institution, among divisions within a single institution, and between individual faculty members within a division. Each institution should have a concrete plan for the determination and distribution of work loads. It should demonstrate the plan's equity and reasonableness in relationship to what the individual faculty member is expected to do, and to the maintenance of scholastic quality in the teaching component of his total responsibility.

Faculty work load distributions for an institution should reflect its avowed purposes. If one of the purposes of an institution is the accomplishment of significant research, for example, it will be expected to show that ample time within its gross faculty work load is provided for research. An institution offering graduate degrees will also be expected to show sufficient time within its gross faculty work load as being available for faculty engagement in research.

In reporting its faculty work loads for purposes of this Standard each institution must show that a realistic amount of time is available in the sum-total of faculty work loads to care for the duties associated with institutional operation; that is, committee as-

signments, participation in administration, executive responsibility for institutional and divisional functions, duties of public and alumni relations, and assigned supervision of student activities.

In calculating the time value of the student instruction load assigned to each faculty member certain factors should be considered including the number of class contact hours, the number of preparations, the weekly student load, available help (such as secretarial, teaching assistants and grading machines), and the amount of time engaged in research. The institution's plan for the determination and distribution of work loads should be subjected to periodic appraisal and revision.

The institution should have suitable policies to protect against the assumption of outside responsibilities by the faculty member which might cause encroachments upon either the quality or quantity of the work he is employed to perform by the institution.

8. Criteria and Procedures for Evaluation

Each institution should have a statement of the criteria against which performance of the indivdual faculty member will be evaluated. These criteria may vary from unit to unit, and between positions, but in total they should be consonant with the purposes of the institution. The criteria should be known and accepted by both the evaluating officials and the faculty, and be readily available to the faculty. Periodic appraisal using established criteria is essential and the institutional organization should establish definite and stated responsibility for both the criteria and procedures to be used in making such appraisals.

9. Promotions in Rank

In institutions in which faculty rank is employed, criteria for promotion based on factors in addition to years of experience should be adopted and understood by all concerned. Promotion procedures and policies should be such as to exercise a positive influence upon the morale and professional development of the faculty. They should reflect regard for rank as a recognition of quality of performance, and not as a substitute for salary.

10. Salary and other Recognitions

The institution should have established criteria and procedures for giving salary increments and other types of recognition.

STANDARD SIX

Library

The library is a vital instrument of instruction, not only in general education but also in the cultural development of students and faculty. The library should be administered as part of the academic program. This administration should include a well-trained professional staff with representatives of the teaching faculty acting in an advisory capacity. The staff should be alert to new curricular developments and needs. Services should be evaluated regularly to observe the library's effectiveness through the nature and extent of its use.

The book and periodical collection should, by quality, size, and nature, support and stimulate the entire educational program. Substantially stronger holdings should be required for graduate and research programs. The collections should be housed in a well-lighted, ventilated, sound-conditioned, and

adequately equipped building, with a seating capacity sufficient to accommodate the needs of the students and faculty. The library should be open adequate and appropriate hours, and the books and periodicals, preferably in open stacks, should be organized for easy access, use, and preservation.

Illustrations and Interpretations

1. Supplementary Document

In conjunction with the Library Standard the following should be used as a reference: **Library Statistics of Colleges and Universities, Institutional Data,** (U. S. Department of Health, Education, and Welfare, Office of Education, Library Services Branch). In using this reference, institutional authorities should consider it a serious danger signal if the library regularly falls in the lowest quarter of any of the categories analyzed.

2. Committee

There should be a proper academic committee concerned for the library which should include the librarian.

3. Records

Pertinent records shall be kept of acquisitions and library use.

4. Budget

The library budget shall cover the purchase, processing, and servicing of the collection of printed library materials. Special services or special materials (such as recordings, films, other audio-visual aids) demanded of and furnished by the library will require funds in addition to regular budgetary allotments.

5. Staff

The library should be adequately staffed by qualified librarians and skilled non-professional personnel, under the direction of a chief librarian who ranks with comparable administrative officers. Professional staff members should be accorded proper recognition, proportionate to their qualifications, experience, and duties. This recognition may consist of faculty rank and status, where appropriate, including comparable salaries and privileges.

The minimum number of professionl librarians required is the number necessary to assume responsibility for administration, readers' services, and technical processes. The marks of a professional librarian are to be taken to include a graduate library degree from a recognized institution, participation in professional library organizations, and performance of duties of a professional nature. The non-professional staff should relieve librarians of work that is essentially clerical.

6. Collections

Faculty members are responsible for participation in book selection. The collections should be frequently tested against recent bibliographies and other standard guides. Continuous weeding should be followed, with the advice of faculty concerned. An institution should be able to show that its library holdings reflect the purposes of the institution, the curricula offered, and the courses taught.

7. Buildings and Equipment

Proper library seating accommodations are needed for at least one-fourth of the largest number of students on the campus at any one period of the day.

In areas of graduate study and research, carrels which may be individually assigned should be provided. Conference rooms and seminars are highly desirable, especially in libraries serving graduate schools.

8. Hours Open

Two and four year colleges should remain open for service a minimum of sixty hours per week, and universities eighty hours per week.

9. Service

Every possible barrier, whether physical or psychological, between patron and book should be eliminated. Any unusual demands on the library for service outside normal academic expectations should be evaluated and, if necessary, receive special support. Evaluation of services may be measured by study of statistical records or by spot checks and studies. The faculty should be invited, at periodic intervals, to criticize and comment upon library service.

STANDARD SEVEN

Student Personnel

All institutional members should have and should express a continuing concern for the total welfare of each student including his physical and mental health, development of capacities and talents, establishment of relationships with other persons, and motivation for progress in intellectual understanding. The institution should seek to know as much as possible about the background of its students and should keep this information current and appropriately confidential.

The institution should provide activities which not only will motivate the students toward significant academic achievement, but also will establish meaningful associations among students, faculty, and the administration and will furnish ample opportunities for the development of numerous individual talents.

In order to maintain quality in student personnel work, the student's records must be accurate, clear, and complete. The records should be readily accessible to those responsible for student guidance. These data, incorporating pertinent information from precollege life, should extend through graduation and into alumni life.

Knowledge of and concern for the student's physical and mental health are of major importance. Effective guidance requires careful evaluation of abilities, interests, and plans. The program of orientation should establish an individual and personal relationship between the entering student and the institution as a whole—that is, its curricula, its range of extracurricular activities, and its general educational objectives.

The value of student activities may be measured by the extent to which these activities contribute to the educational program of the institution. The entire program of student activities should be held under college supervision. Participation of students in such activities should be restricted to those who meet satisfactory academic standards of work. The athletic program of the college shall be organized under faculty supervision and it should meet ethical standards, as well as the prescribed regulations of the athletic conference or association of which the institution may be a member.

Illustrations and Interpretations

1. Administration

Careful evaluation should be made to determine the degree to which the administrative organization of the personnel program supports, contributes to, or detracts from the purpose and objectives of the institution. The size and location of the institution will also affect the pattern of organization for the administration of the student personnel program.

In order for the student personnel program to make its contribution to the total educational program, it requires the recognition, acceptance, and support of the administration and the faculty. Well trained, qualified people should be administratively responsible for the student personnel program and should enjoy comparable status to other university or college administrators.

2. Academic and Personal Records

Institutions shall have adequate student records but should be careful not to maintain unnecessary duplications. The registrar or other appropriate institutional official shall keep files of admissions and matriculation information, scholarship records, transcripts, and other essential data. Some of these records should be duplicated and other pertinent records should be developed and maintained by appropriate academic deans, directors, department heads, and any others charged with the responsibility of counseling.

3. Orientation

The orientation program should be flexible, challenging and current, and should include information that is meaningful and helpful to a student entering

the academic experience. The program should be periodically evaluated.

4. Counseling

The institution, regardless of size, should make provisions for individual attention to students. Experenced counselors should be available to the student in reference to his academic, personal, and vocational problems. In some cases counseling in these areas may be shared by various administrators or faculty. In every case there should be a well developed program, which is periodically evaluated, and for which there is a clear designation of responsibility.

5. Health

The size, location, and nature of an institution will partly determine the extent to which it should provide for medical care. An adequate health record, made before or upon entrance, shall be a part of every student's file.

6. Athletics

In all institutions conducting formal programs of intercollegiate and intramural athletics these activities shall be a part of the total educational program of the institution, and the administration and the faculty shall have the responsibility for and control of all such activities. Admission procedures and requirements, including academic standards and curricular requirements for athletes, shall be the same as for other students.

Funds used to support all athletic programs shall be fully controlled by the administration and shall be reflected in an annual audit of the institution's

financial records. Funds designed for instructional purposes shall not be diverted to the intercollegiate athletic program.

A program of intercollegiate and intramural athletics should provide a variety of opportunities for students who desire participation. Coaches and staff members employed in the athletic program shall have sufficient academic training and orientation to contribute to the educational objectives of the institution. Regular appraisal of the athletic program should be made to determine its value to the educational program of the institution.

7. Alumni

Every institution should keep current and accurate records of the addresses, occupations, and accomplishments of alumni. The effectiveness of an institution is revealed through the attitudes and achievements of those who have attended the institution. The relationship between the institution and the alumni should be one which encourages each alumnus to continue his interest in and to participate in the development of the institution.

STANDARD EIGHT

Physical Plant

The physical facilities, including buildings, equipment, and campus, should be designed and maintained to serve the needs of the institution in relation to its stated purposes. There should be sufficient campus area to provide adequately for buildings and such activities as are related to the educational program of the institution. The physical facilities should be used as efficiently as possible in keeping with

the educational program of the institution and the students it serves. The architectural design and appearance of the physical plant should be in harmony as far as practicable, and should be aesthetically compatible to the educational mission of the institution. A master plan for campus development should be maintained.

Illustrations and Interpretations

1. Existing Plant Facilities

Each institution should establish with the assistance of competent consultants a master plan for the existing campus. A topographical map should be a part of this plan.

Sufficient rooms for classes of various sizes should be available to meet the instructional needs of the institution. These should be properly lighted and adequately equipped, heated, and ventilated for their purposes and their uses.

Thorough space utilization studies should be made to establish actual need before the addition of new plant facilities. Classrooms, laboratories, and other facilities should be properly scheduled for maximum utilization. Special programs requiring special facilities should not be offered unless the appropriate facilities are available.

Periodic studies should be made of the existing plant for the purpose of anticipating necessary renovation and eliminating as far as possible, all hazards, including fire. Competent consultants should be utilized to determine the value of buildings and equipment for adequate insurance coverage.

Adequate landscaping should be utilized to divide the campus into attractive and useful areas. Satis-

factory parking space should be available, and wherever practicable traffic should be banned from pedestrian areas.

2. Expansion of Plant Facilities

Expansion should be considered as a long range program so that plant development can proceed in an orderly sequence, thus eliminating many problems before they occur. The long range plan should include purchase of needed additional property prior to the actual demands for growth and expansion.

The campus development program should indicate space and function of campus activities in terms of long range planning. The location and accessibility of dormitories, dining halls, library, classrooms, and other facilities should be carefully considered and become a part of the master plan. As far as feasible, the long range plan should determine the general design of new buildings so that architectural harmony can be maintained.

It is strongly recommended that administrative officers and faculty members who are to occupy or direct the activities in new buildings be consulted during the planning stages. For example, librarians should be consulted in planning libraries and other professional people should be consulted in planning buildings used for technical purposes.

In the planning and construction of classroom buildings, consideration should be given to changing instructional methods which may be reflected in changes of classroom size, in the use of teaching devices, or both.

3. Maintenance

The duties and responsibilities for plant and cam-

pus maintenance should be clearly defined and specifically assigned. There should also be clear lines of responsibility for campus security, fire protection, and traffic safety.

In the interest of efficiency and economy the cost of maintenance and housekeeping should be evaluated and compared with the data and experience of other institutions. High standards of housekeeping, preventive maintenance, cleanliness, and care of grounds should be observed.

When they are a part of the institutional operations, utilities such as water, power, and sewerage should be properly and efficiently maintained and these systems should be adequate and capable of expansion.

STANDARD NINE

Special Activities

Many institutions have developed a variety of supplemental and special educational programs in an attempt to fulfill their stated objectives and their responsibilities to their constituents. Such programs may be identified as special activities relative to branches, centers, extension classes, correspondence and home study, foreign travel and study, conferences, institutes, short courses, workshops, special evening classes, special summer sessions, and television and radio.

The Standards of the College Delegate Assembly apply directly to all programs involving academic credit; in addition, specific criteria and definitions may be designed for certain programs assigned to the category of special activities. It shall be the re-

sponsibility of the parent institution to justify all special activities (for credit or not for credit) within the framework of its stated purposes and objectves. All special activities programs must be integral parts of the total educational program of the parent institution.

The accreditation of the institution is affected by the quality of each program or course. Special activities shall always be critically evaluated and judged by the College Delegate Assembly as a part of its function in granting or reaffirming accreditation of the total institution.

Illustrations and Interpretations

1. Branch

A branch is a degree-granting division or unit of an institution, located in a geographical setting separated from the parent institution, and authorized by charter for a stated purpose in relation to the parent institution and the area served. A branch has planned programs leading to undergraduate, graduate, or professional degrees which are granted by or in the name of the parent institution.

A branch shall have such programs, financial resources, library, and physical facilities that it may be evaluated essentially as an autonomous institution in terms of the Standards of the College Delegate Assembly, although it need not request individual membership in the Southern Association of Colleges and Schools.

Its organization shall include a full-time chief administrative officer and other administrative officers as are needed for such areas as finance, academic affairs, and student affairs. The chief officer shall be directly responsible to the head of the parent insti-

tution who shall determine to what extent control or direction will be exercised by the faculty and administration of the parent institution.

A branch shall have a majority of full-time faculty. It shall have sufficient financial resources, appropriated directly by the parent institution, or through income from tuition, or through either one or a combination of these, to operate independently and to carry out its educational program.

For the purpose of identification, the parent institution must indicate on its transcripts the name of the campus on which the courses or degrees are completed.

2. Center

A center is a non-degree-granting division or unit of an institution, located in a geographical setting separated from the parent institution and established for a stated purpose in relation to the parent institution and to the area served. The center shall have a pattern or sequence of courses which leads to terminal programs or degrees on the parent campus or at other degree-granting institutions.

The center shall operate under the supervision of an administrative officer responsible to the parent institution. Its admission requirements and procedures, courses to be offered, and faculty shall have the approval and be under supervision of the appropriate departments on the home campus. Each course offered shall have physical facilities (including space and equipment) and library holdings equivalent to those required for the same course on the home campus. Academic requirements and instructional quality shall be equivalent to those maintained at the parent campus.

For purpose of identification, the parent institution must indicate on its transcripts the name of the center where courses are completed.

3. Extension

A course taught by extension is one offered in an off-campus temporary setting, with students and instructor in class attendance. The content and quality of each course, the admission requirements, the preparation of the faculty, and the adequacy of physical facilities should be recognized as college policy matters and as reflecting the integrity of the institution. Care should be exercised in the selection of courses for this type of program. Courses requiring laboratories or extended library study should not be approved unless facilities equal to those expected on the home campus are available.

Courses taken by extension must be so identified on transcripts of student records. Although the specific amount of degree credit which may be earned through extension classes is decided by each institution, it may not exceed one-third of the total hours required for a degree.

4. Correspondence and Home Study

The institution should safeguard the quality of correspondence courses as vigilantly as it safeguards on-campus instruction in regular classes and, in addition, it should take the necessary steps to offset any weaknesses resulting from this method of instruction. Academic standards in correspondence courses shall be comparable with standards in on-campus classes as shown by tests and examinations requiring comparable achievement for degree credit.

Courses taken by correspondence and home study must be so identified on transcripts of student re-

cords. Although the specific amount of degree credit which may be earned through correspondence and home study is decided by each institution, it may not exceed one-fourth of the total hours required for a degree.

5. Foreign Travel and Study

Credit shall not be permitted for travel **per se**, nor shall credit be allowed for commercial programs designed by commercial firms. Degree credit shall be granted only for residence abroad involving an academic program supplemented by seminars, readings, reports, or similar academic exercises based on the same criteria for credit as independent study on the campus. Special attention should be directed to the quality of the academic programs at the foreign institution or institutions. The amount of credit to be awarded should be fully determined by the faculty in advance of the travel.

Courses taken by foreign travel and study must be so identified on transcripts of student records. Although the specific amount of degree credit which may be earned through foreign travel and study is decided by each institution, it may not exceed one-fourth of the total hours required for a degree.

6. Conferences, Institutes, Short Courses Workshops, Special Evening Classes, and Special Summer Sessions

The amount of credit for each course shall be determined through the regular channels and committees of the institution. The institution should safeguard the quality of these programs as vigilantly as it safeguards instruction in regular classes. Academic standards shall be comparable with standards in

regular classes as shown by tests and examinations requiring comparable achievement for degree credit.

The designation of evening classes in this category does not refer to evening classes which are an integral part of the curriculum and an extension of the day schedule. Summer sessions that represent equivalents of the regular session should be considered part of the general curriculum and program.

For purposes of identification, it is recommended that the course title or description carry the designation of type, such as, institute, workshop, conference. Although the specific amount of degree credit which may be earned in this category is decided by each institution, it may not exceed one-fourth of the total hours required for a degree.

7. Television and Radio

Television, in this category, pertains to open-circuit television instruction which originates off the campus or which is transmitted from the campus to outside receivers. It does not pertain to closed-circuit television courses.

The amount of credit for each course shall be determined through the regular channels and committees of the institution. The institution should safeguard the quality of these programs as vigilantly as it safeguards instruction in regular classes. Academic standards shall be comparable with standards in regular classes as shown by tests and examinations requiring comparable achievements for degree credit.

Courses taken by television and radio must be so identified on transcripts of student records. Although the specific amount of degree credit which may be earned by television and radio is decided by each in-

stitution, it may not exceed one-fourth of the total hours required for a degree.

8. Credit Limitations

At least one-fourth of the credits required for a degree from the institution must be earned in residence at the home campus or at a branch of the institution. No more than one-half of the credit requirements for an undergraduate degree may be fulfilled through an accumulation of credits in categories three through seven above. For limitations on graduate credits in the categories of Special Activities see the Standard for Graduate Program.

STANDARD TEN

Graduate Program

A graduate program comprises a course of study beyond the baccalaureate level usually leading to an advanced degree. An institution inaugurating, continuing, or expanding a graduate program should have curricula and resources available beyond those provided for the undergraduate college. Since the quality and excellence of graduate instruction should be of constant concern to every institution offering graduate work, it is essential that the provisions for graduate instruction should include an adequate administrative organization, a competent faculty in the major and supporting fields, and library and laboratory facilities consonant with the programs offered. An institution contemplating the inauguration of a program at a higher degree level should inform the Executive Secretary of the Commission at least one year in advance and arrange for a preliminary advisory study by the Commission before undertaking the program.

The graduate tradition of an institution is based on the careful selection and the stability of staff, teaching quality and scholarly productivity on the part of the faculty, and well-defined principles and practices governing the selection and retention of students. It is important that graduate work be characterized by flexibility, the use of unique abilities, and the production of well trained graduates. The value of graduate work is to be judged by the quality of the product; consequently, a program of continuous evaluation of graduate instruction should be undertaken by an institution so as to maintain and improve the qualitative standards of its work.

A distinction between undergraduate and graduate work should be observed. Although this does not entail a complete separation of these fields of instruction, courses or curricula classified as graduate necessarily involve research relative to such programs. There are many divergent conceptions of research. It is not a mere gathering and organizing of facts and opinions. Research is a discriminating activity of well informed minds concerned with the discovery of new truth, with the critical examination of the evidential basis of knowledge that is accepted as true and believed to be true, with the correction of error, and with the application of both old and new truth to the uses of mankind. Research and training in research are fundamental in all graduate programs.

Graduate work should not be undertaken unless the academic integrity of the undergraduate program can be maintained and financial support for superimposed graduate studies is unusually strong. Institutions embarking upon new programs or expanding existing programs should appraise critically

the resources at their disposal and study the effects of graduate work on the undergraduate program. Graduate education is expensive and institutions engaged in it should take into consideration national estimates of average per student cost in this field of instruction.

Illustrations and Interpretations

General

1. Administrative Organization

Institutional organization should recognize the graduate program as having a separate identity. All policies and regulations affecting graduate curricula and work leading to graduate degrees should be formulated by a graduate faculty, or graduate council, or similar body representing those concerned with graduate instruction. Within this framework there should be provided a well-defined mechanism for determining qualifications for membership in the graduate faculty. Some arrangement or procedure also should exist within the graduate organization by which graduate programs can be reviewed, approved, and re-evaluated.

2. Graduate Faculty

The members of a graduate faculty shall hold the highest terminal earned degrees or the clear equivalent in their fields, shall have avowed interest in graduate instruction, shall have experience in teaching advanced subjects, and shall be productive scholars.

3. Library, Laboratory, and Other Facilities

Institutions offering an advanced degree only at the master's level shall have library and laboratory

resources adequate for the curricula offered and for the introduction of the student to research in each subject offered in the program. For institutions offering graduate instruction beyond the master's degree, and including doctoral programs, these resources should be distinguished in excellence and should provide means for the accomplishment of graduate enterprises of major importance.

The library shall be an instrumentality of research with a book and periodical collection providing students with the means of attaining a mastery of the literature, history, and research materials of their subjects. In the scientific fields, laboratories shall be equipped for special experimentation. In the provision of adequate resources there should be continuous cooperation among the institution's budgetary authorities, the library administration, and the graduate school and faculty. The fact and character of this cooperation can be significant criteria for the appraisal of institutions.

4. Admission and Retention of Students

The maintenance of the ideal of excellence in graduate study carries with it the obligation to select and admit, retain and encourage, as student candidates only those qualified to accomplish work of graduate character. In addition to the critical appraisal of academic transcripts and other formal credentials submitted by the applicant as evidence of fitness for admission, the practice is commended that applicants take and attain satisfactory scores on the Graduate Record Examinations or similar tests. The admission policy of an institution is one of the criteria for accreditation.

Equally important are the principles governing the retention of students. If, prior to admission to candidacy for a graduate degree, or if, during residence as a degree candidate, a student does not maintain a consistently satisfactory level of achievement, he should be advised to discontinue graduate work. Admission to candidacy for a graduate degree should be based on a critical appraisal of the student's academic performance and his scholarly potential.

To maintain the integrity of graduate work in extension courses, the admission of students, quality of instruction, library, and laboratory facilities shall be in conformity with on-campus practices. The transfer of credit to degree programs from recognized institutions and from extension courses shall be restricted so that residence requirements will not be diminished. The unity of the student's program, the intellectual stimulation derived from contacts with his fellow graduate students, and the advantages inherent in close association with the faculty can be best achieved by observing this principle.

Master's Degree

1. Admission

The applicant must possess a bachelor's degree from a recognized institution of higher learning. If the undergraduate institution is not accredited by a regional accrediting agency, additional criteria should be used to safeguard the admission process. The applicant shall present a transcript which, for unconditional admission, shall show a sufficient and satisfactory undergraduate preparation in the major field.

2. Candidacy

Admission to candidacy for the degree should not take place until the student has demonstrated ability (during a semester or quarter of residence or an equivalent period of residence in summer terms) to accomplish work of a graduate character.

3. Program Requirements

The candidate must complete twenty-four or thirty semester hours of graduate work in courses with grades representing a satisfactory level of achievement. In a program requiring a thesis, a minimum of twenty-four semester hours of credit shall be earned exclusive of thesis. In a program in which no thesis is required, there shall be a minimum of thirty semester hours. At least one-half of the courses included for the student's degree program shall be those designated as exclusively graduate and the remainder of the degree courses shall be open only to upper division and graduate students. At least one-half of the credits offered for the degree shall be in a single field of concentration.

For the degree of master of arts and master of science, the requirements of a modern foreign language and a thesis are highly desirable. For the master's degree of a professional nature, other requirements might logically be substituted for a modern foreign language and a thesis. For example, the master of arts in teaching may not use the same criteria but will have a program designed to meet its specific purpose.

4. Credits by Transfer, Extension Study, or Correspondence

Each institution shall develop its own regulations

with regard to transfer and extension credit within the limitations specified below.

Except in cases of planned coordinated inter-institutional programs, not more than six semester hours of graduate credit taken on campus or through extension in a different but recognized institution may be transferred and credited to the master's degree.

Graduate credit not exceeding twelve semester hours may be accepted from extension study in a program under the direction of the degree-granting institution, but such credit may not be applied to reduce on-campus residence.

Not more than a total of twelve semester hours of extension and transferred graduate credit may be accepted towards the master's degree.

No credits toward a graduate degree may be obtained by correspondence study.

5. Minimum Residence

At least eighteen semester hours or the equivalent must be completed on the campus of the degree-granting institution.

6. Comprehensive Examination

A comprehensive examination, either oral or written or both, shall be passed by the candidate covering at least the field of concentration and the thesis, if a thesis is required.

Doctor's Degrees

1. Admission

Unqualified admission to the Graduate School of possible and prospective candidates shall anticipate

in a formal sense the same minimum standard as candidates for the master's degree; namely, the possession by the applicant of a bachelor's degree from a recognized institution and the presentation of a transcript showing a sufficient undergraduate preparation for advanced work in both major and minor fields. The undergraduate preparation shall be broad enough to provide an adequate foundation for graduate work. Adequate preparation shall be attested by the transcript of formal courses and credits and this evidence should be supplemented by an acceptable report on the Graduate Rcord Examinations or comparable tests. Major departments should be encouraged to establish screening examinations of their own for their information and guidance, as well as for a basis of their recommendations for the admission of students to the Graduate School.

2. Acceptance of Credits in Post-Baccalaureate Programs.

The courses of study in pursuance of candidacy for the master's degree, or the first year of graduate study, if properly planned, may be applied in partial fulfillment of requirements for the doctoral degree.

3. The First Two Years of Graduate Study

The courses of study should be planned by a committee appointed by the dean of the Graduate School, or by the departmental committee on graduate instruction of the major department. This plan should aim at giving the student a mastery of the major field; and, in case a minor is required, the plan should enable the student to make sufficient progress in satisfaction of that requirement to keep the program as a whole in balance. During these two years,

the student with faculty advice should have selected a topic for the dissertation and should have made sufficient exploration in the bibliography and materials of the subject to be able to demonstrate the feasibility of the project. By the end of this period any foreign language requirement should have been satisfied and the qualifying examination passed.

4. Course Requirements

The aim of the doctoral program should be to afford instruction and guidance leading to the mastery of a major field. Although independent study on the part of the student is essential to every doctoral candidacy, formal course work is of indisputable value; it reduces the labor of a student; it should bring the student into scholarly relationship with members of the graduate faculty and demonstrate how accepted knowledge of a subject is evidentially supported. Specific course requirements, as deemed necessary, should be stipulated by the student's advisory committee. When the minor is required—which is a supporting subject, selected and constructed for precise purposes, and which is composed of courses—a specific course requirement is proper.

5. Major and Minor

It should be the responsibility and obligation of the departments established within the Graduate School to define the fields in which majors may be offered within their respective areas of instruction. The general content and scope of these majors should be subject to the confirmation of the graduate council or similar body. It is to be understood that the limits and scope of the majors so defined are subject to expansion to satisfy the interests of students; but

the majors should be so thoughtfully framed or reframed that contraction of the limits and scope should not be permitted in individual programs. The unswerving integrity of the major is to be commended. Nothing in the foregoing is to be interpreted as opposition to interdepartmental majors. In the construction of majors, departments and Graduate Schools should avoid the diffuseness that would vitiate specialization and the compression that would cause over-specialization. The widespread practice of requiring a minor in a department allied to the major, to the dissertation subject, or the interest of the candidate is recommended. The minor courses, if required, should be selected within a related but distinct field. If minor courses from more than one department are proposed, the selection of these courses should be subject to the approval of the Graduate School.

6. The Requirement of Foreign Languages

During the first two graduate years and preferably during the first year, the prospective candidate for a doctor's degree which has language requirements should satisfactorily complete such requirements. These languages are thought of as instruments of research and as a means of affording continuing access to materials and literature of foreign culture and scholarships; and their use in these relationships should be exercised as a matter of common practice. This reading knowledge shall be tested in adequate examinations by the pertinent language departments or by a foreign language committee. These examinations should test the ability of the student to read selected passages from the literature of the major subject. The French, German, and Russian lang-

uages are endorsed as those most generally useful. With the approval of the Graduate School, the department of the major may, however, on the grounds of greater pertinence to the student's interests and program of study, recommend any modern foreign language as a substitute for one of these, but approval of such substitution rests with the Graduate School. All language requirements must have been satisfied prior to the preliminary or qualifying examination and prior to admission to candidacy for the degree.

Although a reading knowledge of two foreign languages is usually required for the Doctor of Philosophy degree, statistics and other tools of research are sometimes accepted in lieu of one or both language requirements in other doctoral programs.

7. The Preliminary or Qualifying Examination

At least one academic year prior to the time when the degree is expected to be conferred and ordinarily not earlier than the accomplishment of two full years of graduate work, the student should undertake the preliminary or qualifying examination. On the basis of this examination, the student is to be recommended or not for admission to candidacy. This examination should be designed to fulfill several purposes. An examining committee, appointed especially for each candidate, should inquire into the feasibilty of the dissertation project. The examination should cover subjects and courses of both major and minor fields and should be a rigid test of the student's competence and knowledge. It should be an inquiry of the student's mastery of bibliography and of his powers of bibliographical criticism; further, it should give particular attention to subjects or courses taken

in other institutions for which transfer credit is proposed. The examination should afford the examiners the basis for constructive recommendations as to subsequent programs of studies, if any, to be undertaken by the student. When the student passes this examination and all other conditions are fulfilled, the examiners shall recommend to the Graduate School admission to candidacy. Credit for the preliminary examination shall not be transferable.

8. Admission to Candidacy

The formal act of admission to candidacy shall be a function of the Graduate School. This should be a serious act of responsibility, and the administrative authorities of the Graduate School should be able to attest to the fulfillment of all conditions attached to the act of admission.

9. Transfer of Credit

Credit for work accomplished in recognized institutions is transferable or not, according to each institution's policy. Credit for work that might be transferable may be determined before or after admission to candidacy. In any case a definite part of either the preliminary examination or the final oral examination should be devoted to the testing of the student's mastery of the subjects involved and should be the method of validating such credit.

10. Residence Requirements

The minimum residence requirement for the doctoral degree shall be three academic years beyond the bachelor's degree or their equivalent in shorter units of academic residence. The student should be required to spend at least one full academic year beyond the first year of graduate study in continuous

residence. The transfer work from a recognized graduate school should carry with it transfer of residence credit. Residence credit, however, may not be transferred unless there is also transfer of course work. Graduate residence credit may not therefore be established in fulfillment of requirements for the doctor's degree unless the graduate work accomplished in such periods of residence is embodied in the accepted program leading to the doctor's degree.

11. The Dissertation

The dissertation, required of all candidates for the doctoral degree, should be concerned with a well defined problem lending itself to a study of reasonable length, and it should represent a synthesis of materials more than a compilation of facts. It is recommended that the dissertation be prepared under the direction of a special committee whose supervision should be such that the dissertation will be of reasonable scope. It should comply with the rules of form prescribed by the Graduate School. The institutions conferring the degrees may require the dissertation to be printed for publication or submitted in typewritten form. In the spirit of safeguarding the interests of the student in this form of literary property, consideration should be given to copyrighting.

12. The Final Examination

There shall be a final oral examination which should be directed primarily to the defense of the dissertation. This examination should be administered by a committee appointed by the dean of the Graduate School.

STANDARD ELEVEN

Research

As long as colleges and universities have been established, members of their faculties have made significant contributions through the discovery of new knowledge. The zest for discovery of truths as well as for the communication of knowledge is an essential characteristic of an atmosphere conducive to the development of scholarship.

For adequate support of his individual research program, the teacher-investigator must frequently seek funds from outside sources. In recent years ever-increasing financial support for research has been made available through private and governmental agencies. Such contractual or sponsored research has become an integral part of the activities of colleges and universities today.

Policies relative to research should insure conformity of this activity to the stated purposes of the institution, provide an appropriate balance between research and instruction, and guarantee control of administration of the research by the institution. The investigator's freedom in research, including direction and communication of results, should be preserved.

In using funds from contracts, grants, and contributions in support of research, the institution should not become dependent upon that portion allowed for indirect or overhead cost in support of its regular operating budget.

Illustrations and Interpretations

1. Administration

Although many advantages accrue to institutions from research support possibilities through private and governmental agencies, problems often arise through research contract and grant procedures and administration. As a means of dealing with these problems, the administration of research should provide for conformity of research activities to the stated purposes of the institution.

Responsibility for contractual research should be related to departmental administration. If departmental administration fails to provide leadership, lack of morale and lack of coordination of activities can result.

The institution should have a clear policy relative to the division of responsibility between research and other activities. Certainly each institution may set up its own policy, but it seems essential that some policy be established and that all concerned conform to the stated policy.

The institution should develop definite policies relative to summer salaries paid from contract and grant funds, to salary supplements during the regular academic year, and to research consultative services undertaken by faculty members. These policies may well vary from institution to institution, but again a clearly understood policy is needed.

Administration of research contracts and grants should attempt to minimize the amounts of time utilized by the teacher-investigator in seeking support for and in administering individual research contract and grant programs. Much time can be

saved him if the administrative organization within the institution provides relief for as much responsibility as possible in administrative matters.

2. Institutional Control

In accepting funds from outside agencies, the institution must maintain control of its policies relative to research and instruction. Many agencies attach rather stringent regulations directing and limiting the character of research if they provide funds to support it. The rapid growth in acquisition of research grants from and contracts with outside agencies can endanger the institutional control of its activities unless this prerogative of the college or university is carefully guarded.

Continuity of support for general institutional research activities should not be endangered through the acquisition of research contracts and grants. Grants are given and contracts are made for limited lengths of time. When and if the institution becomes dependent, even partially, upon such funds for faculty salaries or graduate fellowship and assistantship stipends in support of graduate programs, termination of grants or contracts may mean the entire educational program, as well as the research activities, would be seriously jeopardized.

3. Primacy of Teaching Obligations

Discharging responsibility to granting agencies must not reduce teaching effectiveness on the part of the teacher-investigator. The faculty member receiving support from without the university for his research program naturally feels responsibility to the granting agency to accomplish the research ex-

pected, but teaching obligations must not be neglected in order that this responsibility be discharged.

4. Faculty Morale

Care should be exercised that support from outside agencies in some areas within the college or university does not affect adversely the faculty morale in other areas through development of jealousies. If teaching loads are reduced so that obligations to outside agencies may be satisfied, resentment on the part of persons in other areas, or even in the same area, can be a significant basis for low morale. The administrative officers of the institution should provide research support and time for those who are not in a position to seek grants.

5. Expenditure of Research Funds

An institution has the prerogative of developing its own policy of purchasing procedures and, in general, purchases with contract funds should conform to the established procedural policy. Most granting agencies state clearly that purchasing procedures using grant funds must conform to the institution's policies; however, it is not essential that policies governing expenditures of research funds be the same as those governing expenditures of general funds.

6. Freedom of Investigation

The elements inherent in undertaking "classified" research should not tend to destroy the principles of freedom of investigation and of reporting results. This freedom has always been a sacred prerogative of faculties of educational institutions of higher learning, whether privately or publicly supported.

APPENDIX "I"

ODESSA COLLEGE

September 18, 1969

TO: All Faculty Members

FROM: Dr. Jack Rodgers, President

1. The attached proposed statement of academic freedom and responsibility has been prepared by a committee of members of the Board of Regents and faculty members: Regents Harding, Elliott, and Dooley; faculty Jack Hendrix, Mike Willson, and Mrs. Gail Pool.

2. The Committee has suggested that you read the statement; if you have comments, register these with your departmental chairman by Thursday afternoon; chairmen will, in turn, list reactions in writing and turn them in to my office.

3. The statement is essentially the same as that proposed by the Coordinating Board.

ODESSA COLLEGE

September 18, 1968

(PROPOSED) STATEMENT OF ACADEMIC FREEDOM AND RESPONSIBILITY

1. Institutions of higher education are conducted for the common good. The common good depends upon a free search for truth and its free expression. Hence, it is essential that the faculty member be free to pursue scholarly inquiry without undue restriction, and to voice and publish his conclusions concerning the significance of evidence that he considers relevant. **He must be free from the corrosive fear that others, inside or outside the college community, because their vision may differ from his own, may threaten his professional career or the material benefits accruing from it.**

2. The concept of academic freedom must be accompanied by an equally demanding concept of **responsibility, shared by governing boards,** administrators, and faculty members.

3. Each faculty member is entitled to full freedom in the classroom in discussing the subject which he teaches, taking into consideration that he teaches undergraduate students and is guided by a course syllabus. **Each faculty member is also a citizen of his nation, state and community; and when he speaks, writes or acts as such, must be free from institutional censorship or discipline.**

4. However, the exercise of professional integrity by a faculty member includes recognition that the public will judge his profession and his institution by his statements. Therefore, he should strive to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to avoid creating the impression that he speaks or acts for his college when he speaks or acts as a private person.

5. **The fundamental responsibilities** of a faculty member as a teacher and scholar **include a maintenance of competence** in his field of specialization and the exhibition of such competence in lectures, discussions or publications.

6. A faculty member should be judicious in the use of controversial material in the classroom and should introduce such material only as it has clear relationship to his subject field.

7. **A faculty member has the responsibility to provide due notice of his intention to interrupt or terminate institutional services.**

8. **The essential responsibilities** of **governing boards** and **administrators are set forth in the Standards for Colleges,** adopted by the Southern Association of Colleges and Schools, as updated and revised.

STANDARD TWO

ORGANIZATION AND ADMINISTRATION

Copied from
Standards of The College Delegate Assembly
of The Southern Association of Colleges and Schools
(pp. 5-6)

The administrative organization of an institution of higher learning should bring together its various resources and coordinate them effectively to accomplish its objectives. Although a similar pattern of organization for all member institutions is neither required nor expected, the organizational structure and the administrative processes should be well defined and understood by the entire college community.

The governing board, the term used in the Standards to apply to all governing bodies of institutions of higher education, is the legally constituted body representing the founders, the religious group, or the supporting governmental unit. Members of the governing board should be chosen because of their ability and willingness to serve the institution without selfish motives. The board acts as a body politic and no single member can act in place of the total board. Since the governing board holds institutions in trust, there should be a continuity in membership which will assure stability.

The responsibilities of the governing board include establishing broad institutional policies, securing

financial resources to support adequately the institution's program, and selecting the chief administrative officer and, upon his recommendation, the other administrative officers of the institution. The governing board should not be subject to undue pressures from state officials or other outside political or religious groups; furthermore, the govening board should protect the administration from similar outside pressures.

There should be a clear differentiation between the policy making functions of the governing board and the responsibility of those of the governing board terng these policies. General institutional policies may originate within the board or be approved by the board upon the recommendation of the administration. Once these have become the policies of the governing board, the chief administrative officer should be free to implement such policies and to administer the institution within the broad policies laid down by the board.

In addition to the administrative head of the institution, there should be other administrative officials directly responsible to him. The duties of these officers should be well defined and known to the faculty and staff. An effective pattern of organization will contribute to the development of the institution and to general morale. Opportunities for adequate communications throughout the institution are highly important.

ARGUMENT AND SUBMISSION

Extract from the Minutes of April 15, 1970.

ROBERT P. SINDERMANN, for himself and for all others similarly situated

No. 28372

versus

CHARLES R. PERRY, et al

On this day this cause was called, and after argument by Richard J. Clarkson, Esq., for appellant, and W. O. Shafer, Esq., for appellees, was submitted to the Court.

* * * * *

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 28372

ROBERT P. SINDERMANN, for himself and others similarly situated,
Plaintiff-Appellant,

versus

CHARLES R. PERRY, et al.,
Defendants-Appelles.

Appeal from the United States District Court for the Western District of Texas

---

(August 10, 1970)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges

CLARK, Circuit Judge: The court below disposed of this case by summary judgment but because we find that this case presents issues of constitutional law, the longest way around now proves to be the shortest way through the thicket. The Board of Regents of Odessa Junior College voted not to renew the employment contract of Professor Robert P. Sindermann. Sindermann filed suit in the district court alleging that the action of the Regents in refusing to offer him a new term of employment was based sole-

ly on his exercise of First and Fourteenth Amendment rights of expression, association and petition and alleging violations of due process in connection with this refusal. Finding the contract rights of the parties clear, the court granted a motion of defendants for summary judgment. Shortly after the summary judgment was appealed, this court decided **Pred v. Bd. of Public Instruction,** 415 F.2d 851 (5th Cir. 1969), which classifies the rights of persons circumstanced such as plaintiff as constitutional rather than contractual. **Pred** aligned this court with the 4th Circuit[1] and against the 10th Circuit[2] in this as yet unresolved conflict between circuits. This new development in decisional law, coming as it did after the decision of the court below, renders that court's summary judgment inappropriate and erroneous. We reverse for further development of the facts.

BACKGROUND:

Professor Sindermann became a member of the Odessa College faculty in September 1965, after previous college teaching experience. By a succession of one-year contracts he remained a faculty member until the end of the 1968-69 school year. On May 19, 1969, the college president notified Sindermann that the Regents had voted to approve the president's recommendation not to renew his contract for 1969-70. Sixteen days later Sindermann filed the present action and contemporaneously with the instigation of litigation, requested that he be given a hearing by college authorities. Apparently no such hearing has been afforded.

---

[1]Johnson v. Branch, 364 F.2d 177 (4th Cir. en banc, 1966), cert. denied 385 U.S. 1003, 87 S.Ct. 706, 17 L.Ed.2d 542 (1967).

[2]Jones v. Hopper, 410 F.2d 1323 (10th Cir. en banc, 1969), cert. denied ____ U.S. ____, 90 S.Ct. 1111, ____ L.Ed. 2d ____ (1970)

During the 1969-70 school term no member of the Odessa College faculty had any formal assurance of continuation of employment beyond the present school term.[3]

Shortly before official notice of the decision not to renew plaintiff's contract, the college issued an 11-page press release documenting the deterioration of its relationship with plaintiff. The highlights are reflected in this chronology from that document. The validity of Professor Sindermann's work with Odessa College was recognized by his nomination to be co-chairman of the Social Science Department with an increase in pay. As soon as he became co-chairman, he began to circularize lengthy letters to the members of his department. This resulted in his being dropped as co-chairman in the Fall of 1968 but with no corresponding reduction in salary. In February 1969 Sindermann was elected president of the Texas Junior College Teachers Association.[4] Sindermann accepted this office without consultation with any administrative officer of Odessa College and immediately requested student clerical help, a reduction in teaching load and time off during winter months to visit other junior colleges, which had not been true with former faculty members who served in this same office. Sindermann also aligned himself with

[3]The official Faculty Guide published by the college contained the following paragraph:

"Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

[4]The Faculty Guide indicated complete administration approval of this organization in the following language:

"Professional Memberships: Odessa College faculty members pride themselves on one hundred percent membership each year in the Texas State Teachers Association and Texas Junior College Teachers Association."

a group known as "The Committee to Elevate Odessa College", a group seeking to raise Odessa College to a 4-year status—a move officially opposed by the Board of Regents. Plaintiff's name appeared as sponsoring a newspaper advertisement ridiculing the position taken by the Board of Regents on Odessa College's 4-year status.[5]

On at least four occasions Sindermann requested permission from college officials to absent himself from the campus and his teaching duties in order to testify before committees of the Texas legislature on a bill relating to academic freedom and tenure. These requests were each refused but Professor Sindermann nevertheless attended the committee hearings. The press release concluded by quoting a telegram from Sindermann to a Senator which, in part, stated: I have been fired from Odessa College for attempting to testify on S.B. 512." It noted however that Sindermann had not been officially advised that his contract would not be renewed. The letter of "official" notification of non-renewal shortly followed the press release.

PLEADINGS AND PROCEEDINGS:

Sindermann's complaint alleged that his contract was not renewed in order to retaliate against him for expressions of opinion, that he was a competent classroom teacher, that he had not been offered an impartial hearing in connection with the non-renewal of his contract, that the action taken against him had a chilling effect on other professors at Odessa College,

---

[5]Sindermann disclaimed any connection with the advertisement but the press release held, that his "guilt by association" could not be rejected because he allied himself with the Committee to Elevate Odessa College.

and that he had been damaged in his professional reputation and standing. He sought compensatory and punitive damages and attorneys fees, a declaratory judgment adjudicating that the Regents' action violated his constitutional rights and that he was entitled to a hearing under suggested procedural guidelines, and a mandatory injunction requiring his reinstatement for the 1969-70 college year at the same level of responsibility and function he had previously held. He named as defendants the members of the Board of Regents and the college president, individually and in their official capacity. The Board of Regents moved to dismiss the action insofar as they were sued in their official capacity. All defendants moved for summary judgment.

Only three affidavits were filed in the course of the pleadings. All were by the plaintiff, Sindermann. The first supported his motion for injunction, the second opposed summary judgment, the third verified the authenticity of the exhibits to his complaint. After denying the motion to dismiss,[6] the court granted defendants' moton for summary judgment on the basis of the findings and conclusions set out in the margin.[7]

---

[6] This action was correct. Harkless v. Sweeny Independent School District, ____ F.2d ____ (5th Cir. 1970) (No. 28188, June 2, 1970).

[7] Findings:

"I. Plaintiff's tenure of employment ended May 31, 1969.

"II. Odessa Junior College has no tenure system which fact was known to the Plaintiff at the time he entered into his original contract with the college.

"III. After the termination of his contract of employment the Defendant college owed no obligation to the Plaintiff."

Conclusions:

"I. Plaintiff has no cause of action against the Defendants since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system.

"II. Plaintiff has no contract with the Defendant college.

"III. Plaintiff has no right which would require Defendants to execute a contract with Plaintiff, or to employ Plaintiff.

"IV. Defendants have not violated any constitutional rights of the Plaintiff."

SUMMARY JUDGMENT:

Pred v. Bd. of Public Instruction, supra, invalidates the basic legal premise of the Court's summary judgment. There we said:

> "Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any right protected by § 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractual one, nor could it be since no **right** to reemployment existed. What is at stake is the vindication of constitutional rights — the right not to be punished by the State or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendment rights." (415 F.2d at 856)

See also Orr v. Thorpe, ___ F.2d ___ (5th Cir. 1970) (No. 27674, June 10, 1970).

In a legally analogous situation, the Supreme Court has made it clear that even the broad discretion vested in a State government to fix municipal boundaries cannot be used as an instrument to circumvent constitutionally protected rights and that where constitutional wrongs are perpetrated in the guise of fixing city limits, the breadth of the legislative power being exercised provides no insulation from judicial correction. **Gomillion v. Lightfoot,** 364 U.S. 339, 81 S.Ct. 125, 5L.Ed.2d 110 (1960).

The controlling effect of **Pred** is in nowise lessened by the circumstances in the case at bar that Sindermann requested permission to be absent from his

teaching duties to exercise constitutional rights, that such permission was refused and that he deliberately disobeyed administrative directions. The inquiry still comes back to be whether the college refused to renew the teaching contract on an impermissible basis —as a reprisal for the exercise of constitutionally protected rights. We reject the sophistry which would recognize that the college could not withhold renewal of Sindermann's contract because of his association with the Committee to Elevate Odessa College or because of his exercise of a reasonable right to petition the legislature by attending committee hearings but, at the same time, recognize a right in the college administration to direct him not to exercise these rights then refuse to renew his contract for disobedience of their orders. **Compare Sheldon v. Tucker,** 364 U.S. 479, 81 S.Ct. 247, 5L.Ed.2d 231 (1960).

However, a valid distinction might be drawn between a dismissal on bare bones pleadings as was involved in the **Pred,** and a disposition on summary judgment as in the case sub judice. This Court has affirmed the use of summary judgment to dispose of constitutional issues, **Hawthorne v. United States,** 115 F.2d 805 (5th Cir. 1940), see also **Dawkins v. Green,** 285 F.2d 772 (N.D. Fla. 1968), but this form of disposition is often inappropriate in cases involving issues of far-flung import. **Compare Hall v. Garson,** ___ F.2d ___ (5th Cir. 1970) (No. 29690, July 22, 1970) Part II B; **Kennedy v. Silas Mason Co.,** 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948); and **Dispatch, Inc. v. City of Erie,** 364 F.2d 539 (3rd Cir. 1966). It was totally inappropriate in the case at bar, where the only affidavits on which summary judgment was based were submitted by the plaintiff and where there was a clear offer to

prove facts constituting a constitutional claim. **Whitaker v. Coleman,** 115 F.2d 305 (5th Cir. 1940). Summary judgment should be granted only when the truth is clear, where the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. **Cole v. Chevron Chemical Co.,** ___ F.2d ___ (5th Cir. 1970) (No. 29032, June 10, 1970). While there was no dispute about the facts underlying Sindermann's contract status with Odessa College, the truth of his constituional position was far from clear. The basic facts, as well as the material inferences to be drawn therefrom, were in total dispute. Summary judgment was improper. We explicitly note that we deal only with procedures and not with the merits. The remand for factual explication is made with no intimation whatsoever as to what outcome such further development should produce.

ACADEMIC HEARING PROCEDURES:

Since the case must be remanded, it is appropriate that we comment on plaintiff's contention that the college denied him procedural due process by simply announcing that he would not be rehired and failing or refusing to give him a hearing.

Before specifying what procedural devices ought to be available to Professor Sindermann at the collegiate level, a determination must be made as to whether the teacher involved has tenure or an expectancy of re-employment under the policies and practices of the institution. **See Ferguson v. Thomas,** ___ F.2d ___ (5th Cir. 1970) (No. 28227, June 23, 1970) and **Greene v. Howard University,** 412 F.2d

1128 (D.C. Cir. 1969). The factual development of the record in its present posture is too scanty for this court to decide whether this second alternative applies to Sindermann.[8] After the facts are developed, if the trial court should conclude that Sindermann did have an expectancy of reemployment, then the applicable notice and hearing standards are now established in **Ferguson.**

On the other hand, if the court resolves that Sindermann did not have an expectancy of reemployment which would require the college to show cause for the decision not to renew his contract, a different procedure would be indicated. In such a situation, upon receipt of notice that a new contract will not be offered the teacher must bear the burden both of initiating the proceedings and of proving that a wrong has been done by the collegiate action in not rehiring him. It is incumbent upon such a teacher, not the college, to shoulder these responsibilities because the college may base its decision not to reemploy a teacher without tenure or a contractual expectancy of reemployment upon any reason or upon no reason at all. **Bomar v. Keyes,** 162 F.2d 136 (2nd Cir. 1947). **Cf. Smith v. Board of Regents,** ___ F.2d ___ (5th Cir. 1970) (No. 28159, May 26, 1970). A requirement such as plaintiff suggests, that a college must always assign a cause for not renewing the contract of any teacher on its staff, would have the legal effect of improperly denying to colleges free-

[8]The "Teacher Tenure" statement, supra n. 3, creates at least some doubt in this court's mind as to whether this institution might have failed in its apparent attempt to secure the best of both worlds.—attracting teachers who think they will be free from annual reemployment pressures, while at the same time retaining broad discretion to make or refuse a new contract each year. The Faculty Guide also sets out "Criteria for Retention of Teaching Personnel" which add to the uncertainty.

dom of contract to employ personnel on a probationary basis or under annual contracts which are unfettered by any reemployment obligation. Every teacher would thus be granted substantial tenure rights by court edict. Courts do not make contracts for colleges or teachers any more than for any other litigants.

Upon receipt of the college's notice that it will not renew his contract, if a teacher determines to assert that such non-renewal is really a form of punishment for his exercise of constitutional rights or otherwise constitutes some actionable wrong, the teacher should notify the institution with reasonable promptness of his claim in sufficient detail to fairly enable the institution to show any error that may exist and request a hearing. Upon the receipt of this notice and request the institution should constitute a tribunal to conduct such a hearing that both possesses some academic expertise and has an apparent impartiality toward the charges.

This hearing must include the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition.[9] Of course the whole point of the academic process is lost unless the hearing affords a meaningful opportunity to develop a record which can, if necessary, later form a substantial part of any court proceeding — a transcript which should demonstrate that the academic tribunal based its decision upon matters

---

[9] In Mack v. Florida State Board of Dentistry, _____ F.2d _____ (5th Cir. 1970) (No. 28085, July 7, 1970), we noted that while administrative hearings are not to be conducted with the formalities and strictures of a court trial, they should not be allowed to degenerate into an ungoverned confrontion. The virtues of having a presiding officer with legal training if the parties are represented by counsel, is equally apropos here.

adduced before it. This is not so just to accommodate court procedures. More importantly, it is the process best calculated to reach a fair accord and to settle the problems which have arisen between the parties. After all, the candid settlement of differences that arise between men is the essence of civil justice for which we strive.

It has been indicated to this court that the college administration was served with this court's subpoena before it received any request for a hearing from Professor Sindermann. If this be correct, then he may have "jumped the gun" in filing the present litigation. School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination.

Except in cases where the teacher or the institution refuses to follow these suggested procedures or the positions of the parties are such as to demonstrate that following such procedures would be a needless waste of time (a finding which the trial court may, on remand, deem appropriate in this case), a court whose jurisdiction is invoked ordinarily should stay its hand until the matter has been made ripe for court adjudication by allowing such procedures to function.[10] If at the conclusion of the academic processes the matter must still come before the court for review, the presentation there arrives buttressed with

[10]See Ferguson, supra, and Stevenson v. Board of Education, ____ F.2d ____ (5th Cir. 1970) (No. 28875, May 26, 1970).

the record developed before the academic agency, which is entitled to great weight.

CONCLUSION.

This action was brought as a class action on behalf of Professor Sindermann and "on behalf of many of the Odessa Junior College faculty members too numerous to join herein, who have been intimidated and harassed by the Defendants, or their agents, for expressing their opinions, and on behalf of many Odessa Junior College faculty members too numerous to join herein, who have become fearful and reluctant to express their opinions because of the conduct of the Defendants as described herein." However, no party before this Court has raised the propriety or impropriety of the class action aspects of this suit under Rule 23, Fed. R. Civ. P. See C. Wright, Federal Courts, § 72, pp. 306-317 (2d ed. 1970); also **Carpenter v. Davis,** ___ F.2d ___ (5th Cir. 1970) (No. 27686, April 9, 1970) and **Eisen v. Carlisle & Jacquelin,** 391 F.2d 555 (2nd Cir. 1968). We therefore make no adjudication whatever on this question.

The summary judgment is reversed and the cause is remanded for futher proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1969
NO. 28372

D. C. Docket No P-69-CA-54

ROBERT P. SINDERMANN, for himself and others similarly situated,
Plaintiff-Appellant,

versus

CHARLES R. PERRY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

It is further ordered that defendants-appellees pay to the plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 10, 1970

Issued As Mandate: October 14, 1970.

(Number and Title Omitted. Filed Jun. 11, 1969)

(September 9, 1970)

ON PETITION FOR REHEARING

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

(Number and Title Omitted. Filed Jun. 11, 1969)

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages contain a full, true and complete copy of the following papers:

Mimeograph Appendix, Argument and Submission, Opinion of the Court, Judgment and Order Denying Petition for Rehearing; in the above cause in this Court as full, true and complete as the originals of the same now remain in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United State Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this date.

EDWARD W. WADSWORTH
Clerk of the United States Court
of Appeals for the Fifth Circuit.

By Claudette Staiger
Deputy Clerk

DATE: November 11, 1970

Supreme Court of the United States

No. 952--------, *October Term, 1970*

Charles R. Perry, et al.,

Petitioners,

v.

Robert P. Sindermann, etc.

ORDER ALLOWING CERTIORARI. Filed June 14----------, 1971.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth----------Circuit is granted.

No. 70-36

No. ~~952~~

Supreme Court, U.S.
FILED
NOV 9 1970
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

CHARLES R. PERRY, et al,
Petitioners

vs.

ROBERT P. SINDERMANN,
for himself and for all others similarly situated,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. O. SHAFER
P. O. Drawer 1552
Odessa, Texas 79760

LUCIUS D. BUNTON
P. O. Drawer 1552
Odessa, Texas 79760

RAYMOND D. WIER
103 O'Michael Building
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS,
BUNTON & McCOLLUM
P. O. Drawer 1552
Odessa, Texas 79760

Of Counsel

SUBJECT INDEX

	Page
Opinion of the Court Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	3-5
Statement	5-9
Argument	9-20
Conclusion	21
Certificate of Service	22
Appendix A August 10, 1970 Opinion of Court of Appeals	1-13
Appendix B August 10, 1970 Judgment of Court of Civil Appeals	14-15
Appendix C September 9, 1970 Opinion and Order Denying Rehearing	16

INDEX OF AUTHORITIES

Cases

	Page
Beilan v. Board of Education of Philadelphia, 357 U.S. 399, 2 L.Ed. 1414, 78 S. Ct. 1317 (1958)	12-13, 14
Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947)	19
Bradford v. School District No. 20, Charleston, South Carolina, 364 F.2d 185 (4th Cir. 1966)	14-16
Ferrell v. Dallas Independent School District, et al, 392 F.2d 697 (5th Cir. 1968)	16-18
Jones v. Hopper, 410 F.2d 1323 (10th Cir., en banc, cert. denied ___ U.S. ___, 90 S.Ct. 111, ___ L.Ed.2d ___ (1970)	2, 3, 9-10, 11

Constitution

First Amendment	3
Fourteenth Amendment	3-4

Statutes

28 U.S.C., Sec. 1343	5
28 U.S.C., Sec. 1254 (1)	2
42 U.S.C., Sec. 1981	14
42, U.S.C., Sec. 1983	4, 5, 14
Article VII, Sec. 1, Texas Constitution	4
Article VII, Sec. 3, Texas Constitution	4
Article 2815h, Sec. 13, Texas Civil Statutes	4, 6
Article 2815h, Sec. 20, Texas Civil Statutes	5, 6
Article 2815o, Texas Civil Statutes	5

No.

In the

Supreme Court of the United States

CHARLES R. PERRY, et al,

Petitioners

vs.

ROBERT P. SINDERMANN,
for himself and for all others similarly situated,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Charles R. Perry, William L. Pettit, Guy Elliott, James F. Ocker, Betty Dooley, G. Kirk Harding, R. C. Mason, Otto Pavlicek, Joe

C. Zant, all individually and as members of the Board of Regents of Odessa Junior College, and Dr. Jack Rodgers, individually and as president of Odessa Junior College and the Board of Regents of Odessa Junior College, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which, as the lower court admits, is in conflict with the prior decision of the 10th Circuit in **Jones v. Hopper,** 410 F.2d 1323 (10th Cir., en banc, 1969), cert. denied ..... U.S. ....., 90 S. Ct. 1111, ... L. Ed. 2d ..... (1970).

I.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals is not yet reported. It is printed in Appendix A hereto.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1970, and is printed in Appendix B hereto. Rehearing was denied on September 9, 1970, and that order is printed in Appendix C hereto. Jurisdiction is invoked under 28 U.S.C., Sec. 1254 (1).

III.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the judgment of the trial court and in remanding the case for trial, because the pleadings and sum-

mary judgment evidence established that petitioners did not deprive respondent of any right, privilege or immunity secured by the Federal Constitution and laws, and the trial court so held.

2. Whether the Court of Appeals erred in reversing the judgment of the trial court because respondent had no constitutionally protected right to have his teaching contract renewed, had no tenure and had no expectancy to continued employment under the Constitution and Laws of the State of Texas and because the petitioners, in electing not to renew respondent's contract, validly exercised the discretion conferred and imposed upon them by the Constitution and Laws of the State of Texas.

3. Whether the Court of Appeals erred in refusing to follow **Jones v. Hopper, supra,** a case decided on similar facts and allegations and which should control the disposition of this case.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fourteenth Amendment:

"Section 1. . . . No state shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

3. 42 U.S.C., Sec. 1983:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

4. Article VII, Sec. 1, Texas Constitution:
" . . . it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

5. Article VII, Sec. 3, Texas Constitution:
" . . . and the Legislature may also provide for the formation of school districts by general laws; . . .".

6. Article 2815h, Sec. 13, Texas Civil Statutes:
"The Board of Trustees of the Junior College shall have the power to select a president, dean or other administrative officer, and, upon his recommendation, to select the faculty and other employees of the college, and to fix the compensation and

manner of payment of such administrative head, faculty and employees . . .".

7. Article 2815h, Sec. 20, Texas Civil Statutes: " . . . Said Board of Trustees shall adopt such rules, regulations and by-laws as they may deem proper, and they shall have exclusive power to manage and govern said Junior College . . .".

8. Article 2815o, Texas Civil Statutes: Changed the Board of Trustees to a Board of Regents and increased members from 7 to 9.

V.

STATEMENT

This suit was brought in the United States District Court for the Western District of Texas, Midland-Odessa Division, by respondent Sindermann against the petitioners, who were the Board of Regents of Odessa Junior College, the individual members of the Board of Regents and the president of the college. Respondent based jurisdiction on 42 U.S.C., Sec. 1983 and 28 U.S.C., Sec. 1343.

Respondent alleged, in effect, that he was a teacher at Odessa Junior College for the school year 1968-1969 and that his contract was not renewed for the succeeding year in order to retaliate against him for his exercise of certain rights guaranteed under the First and Fourteenth Amendments to the Constitution. Respondent sought judgment that the decision of the petitioners not to renew his contract was in violation of his rights, that he be given a formal hearing on the reasons his contract was not renewed,

that he be retained on the faculty for the succeeding school year and for $475,000 in actual and punitive damages. All of the petitioners filed motions for summary judgment. These were granted by the trial court which found that respondent had no cause of action, had no contract, had no right which would require petitioners to execute a contract with respondent or to employ him and that petitioners did not violate any constitutional rights of respondent.

Respondent Sindermann became a member of the faculty of Odessa Junior College in 1965 and by successive one-year contracts remained on the faculty through the 1968-1969 school year. His last one-year contract expired on May 31, 1969, which was the end of the school year. (Plaintiff's First Amended Original Complaint, Par. VI).

Odessa Junior College has no tenure system. No member of the faculty had any formal assurance that their employment would be continued beyond the school year during which they were teaching. This fact was not only known to Mr. Sindermann at the time he entered into his original contract with the college but such fact was affirmatively stated in the Faculty Guide which was in use at the time of the commencement and throughout his employment. (Plaintiff's First Amended Original Complaint, Par. VII; Plaintiff's Appendix "A", at page 3). The renewal of a teacher's yearly contract is discretionary with the president and the Board of Regents under applicable state law as well. Article 2815h, Secs. 13 and 20, Tex. Civ. Stat., set out **supra.**

At one time Mr. Sindermann was made co-chair-

man of the Social Science Department with a $300 per year increase in pay. In the fall of 1968, however, he was dropped as co-chairman because of his addiction to writing lengthy letters to other members of his department and his unwillingness to follow certain administrative procedures. His salary was not reduced. (Pgs. 1-2, Appendix A to Plaintiff's First Amended Original Complaint).

In February of 1969 Mr. Sindermann was elected president of the Texas Junior College Teachers Association. Immediately after his election, contrary to the previous actions of other College faculty members who had held this same position, Mr. Sindermann requested a full time secretary, that he be relieved of a portion of his teaching load and that he be given time off from his classes to visit various other Texas junior colleges. These requests were refused. (Pgs. 2-3, Appendix A to Plaintiff's First Amended Original Complaint).

On April 9, 1969, Mr. Sindermann sent a letter to Professor Sedate, Dean of the Evening College and Chairman of the Social Science Department, requesting permission to be absent from his classes for the purpose of appearing and testifying in Austin, Texas, in connection with certain legislation pending in the Texas legislature. Pursuant to the provisions of the Faculty Guide, the letter was referred to the Dean of the College and then to the President. The request was denied by the President and a letter to this effect was sent to Mr. Sindermann on April 10, 1969. (Plaintiff's Appendix "A", pgs. 4-6).

On the afternoon of April 22, 1969, Mr. Sinder-

mann again requested permission from the President of the college to be absent from his classroom and his teaching duties for the purpose of appearing and testifying at Austin, Texas, in support of certain legislation. This permission was denied by the president of the college, whose decision in such matters is final under the provisions of the Faculty Guide. In spite of the refusal, Mr. Sindermann was absent from his classes on April 23, 1969, and went to Austin to testify in connection with the legislation involved. However, no hearing was held in Austin and he did not testify.

Again, under date of April 25, 1969, Mr. Sindermann, by letter, requested permission from the chairman of his department to be absent from his classes on April 28, 1969, for the purpose of once more going to Austin to testify in support of certain legislation. He was again denied permission to be absent from his classroom duties and this refusal was delivered in writing to his home on April 26, 1969. In spite of this refusal by his superiors, Mr. Sindermann, by letter dated April 27, 1969, advised the chairman of his department that he would be absent anyway on April 28, 1969, and he was so absent from his classes, contrary to the instructions of the administration. (Plaintiff's Appendix "A", pgs. 7 and 8). Respondent affirmatively pleaded in his complaint and it is his position that these absences were "unauthorized" and without "the College Administration's approval". (Plaintiff's First Amended Original Complaint, Par. XII; Appellant's Brief, pg. 32). This was one of the reasons for failing to renew his

contract (Plaintiff's Affidavit in Support of a Motion Opposing Summary Judgment).

Under date of May 19, 1969, the president of Odessa Junior College notified Mr. Sindermann that the Board of Regents had voted to approve the president's recommendation not to renew Mr. Sindermann's contract for 1969-1970. (Appendix F. Plaintiff's Original Complaint). This suit was filed some three days later on May 22, 1969. Until the suit was filed, no request had been made for an administrative hearing. No hearing was held.

Each of the foregoing facts are established without contradiction or dispute by respondent's own pleadings.

VI.

ARGUMENT

Jones v. Hopper, supra, is directly contrary to the opinion of the court below and was so recognized by the court below. In **Jones,** the complainant was an associate professor of philosophy at Southern Colorado State University. He did not have a tenure privilege. Jones was employed under one-year contracts and at the end of his second year, the appellees, who were the president and the board of trustees of the college, determined he would not be rehired for a third year. Jones then filed suit under the Civil Rights Act claiming that he was not rehired because he had exercised his constitutionally protected rights under the first and fourteenth amendments in (a) objecting to the disqualification of an applicant for his department; (b) attacking an

English text book in a student newspaper; (c) founding an independent publication containing articles criticizing the war in Viet Nam, commenting on labor problems and pacifism and objecting to monitored classrooms; and (d) supporting a student in his dispute with the draft board. Jones contended that he had an expectancy of continued employment which was terminated because of the conduct described and that this was an injury to an interest protected by the Civil Rights Act. Jones further contended that the appellees conspired to punish him for exercising his constitutional rights.

The trial court dismissed the complaint for failure to state a claim upon which relief could be granted. This was affirmed on appeal, the Circuit Court holding that Jones was not deprived of any rights, privileges or immunities secured by the Federal Constitution and Laws. The appellate court reasoned first, that Jones had no contract interest which was breached since the contract expired and did not exist, and second, that because of broad powers of management and control conferred on the Board of Trustees by Colorado Law, Jones had no expectancy to continued employment.

This decision should be controlling. First, the complaint in the instant case makes no allegation that a contract existed and seeks no recovery for a breach of contract. Second, the powers conferred by Texas Law upon the Board of Regents and President of Odessa Junior College are no less broad than those of Colorado Law. See Texas statutes cited above. Petitioners are given the power to select the

faculty and exclusive power to manage and govern the junior college. The statutory powers given to the Board, the one-year contract and the lack of tenure all, as clearly as in **Jones,** militate against and deny an expectancy to continued employment. Mr. Sindermann was not deprived of any constitutionally protected right or privilege and the trial court was correct in so holding.

The conflict presented by **Jones** and the opinion of the court below is obvious. It must be reconciled for the guidance of our educational institutions.

The summary judgment evidence establishes that the petitioners, in not rehiring Mr. Sindermann, did not exceed their authority nor abuse the discretion imposed by State Law. Surely, petitioners must retain some control over the makeup of the faculty. The issue in not rehiring and the concern of the administration, as shown by the press release attached as "Exhibit A" to Plaintiff's Amended Complaint, were not that Mr. Sindermann had spoken out or exercised his right of free speech, but that he had in the past caused some inconvenience in his department with lengthy letters, evaded administrative procedures, made unusual demands of the college with respect to his Texas Junior College Teachers Association position and strongly indicated that position was paramount over the teaching function he was employed to perform. This pattern finally culminated in Mr. Sindermann's disregarding his teaching function and the instructions of the college administration in order to lobby, at a time of his own choosing, for legislation in which the Association was interested despite the fact the Association employed

an agent for this very purpose. The petitioners, in the exercise of the discretion imposed upon them by Texas Law, and subject to election by the voters of the Junior College District, had the right to consider the past attitude and conduct of the respondent in determining the makeup of the college faculty and in determining whether or not the best interests of the college and its educational function would be promoted by refusing to rehire petitioner or any other professor. This discretionary power has been exercised in a reasonable, legitimate manner consistent with all constitutional and statutory rights of Mr. Sindermann.

An analogous case is **Beilan v. Board of Education of Philadelphia,** 357 U.S. 399, 2 L.Ed 1414, 78 S. Ct. 1317 (1958). There a teacher refused to tell his immediate supervisor whether or not he had ever been a member of the communist party, and was dismissed on the grounds of incompetency.

Justice Burton, in his opinion for a majority of the Supreme Court, said:

> "The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory incompetency 'based on his refusal to answer the superintendent's questions.' "
>
> * * * * *
>
> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him

by his employing Board examining into his fitness to serve it as a public school teacher."

* * * * *

"It (the Board) took care to charge petitioner with incompetency, and not with disloyalty. It found him **insubordinate** and lacking in frankness and candor — it made no finding as to his loyalty."

* * * * *

"In the instant case, the Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's '**deliberate** and **insubordinate** refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness.' 386 Pa., at 91, 125 A.2d, at 331. This interpretation is not inconsistent with the Federal Constitution." (Emphasis added.)

Paraphrasing Justice Burton, we might say that Professor Sindermann, by engaging in teaching at Odessa Junior College, did not give up his right to speak out. He did, however, undertake obligations of candor, discipline and cooperation and his failure to live up to those obligations resulted in the refusal of the Board of Regents to reinstate him.

Respondent's pleadings admit that Odessa Junior College has no tenure system, and that an employee of the college can expect to be employed only so long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors. The **Beilan** case found, as a matter of law, that simply refusing to answer questions of an administrative superior was

deliberate insubordination amounting to incompetency and that discharge on this basis was not violative of any of petitioner's rights under the Constitution of the United States (and this, in a tenure state). Certainly, in the instant case, Sindermann's deliberate course of conduct brings him within the framework of **Beilan.**

In **Bradford v. School District No. 20, Charleston, South Carolina,** 364 F.2d 185 (4th Cir. 1966), the appellant, a teacher in a high school in Charleston, brought a suit in the federal district court, claiming that the School Board violated his due process rights because he was dismissed from his position without notice or opportunity to be heard. Although Bradford based his action on Sections 1981 and 1983 of Title 42, U.S.C., the suit was dismissed with prejudice.

Bradford alleged that he went to a barbershop, was refused service, and was thereafter arrested for being drunk, disorderly, and assaulting an officer. He was tried in Corporation Court, found guilty and appealed his conviction to the county court, where it was still pending. He pleaded he was dismissed from his teaching job because of his alleged misconduct. The trial judge held that the petition failed to state a cause of action. The appellate court stated that the district court had properly treated the motion to dismiss as a motion for summary judgment under Rules 12(b) and (c), and that the motion was supported by allegations in the complaint which showed a valid ground for the school board's action of dismissal.

Circuit Judge Bell stated:

"We think too the court was justified in rejecting the plaintiff's contention that his right to equal protection of the laws was violated by the action of the school Trustees. That the Trustees had the statutory duty and responsibility of supervising the conduct of teachers and of dismissing them in proper cases is conceded. **Adler v. Board of Education,** 342 U.S. 485, 72 S. Ct. 380, 96 L.Ed. 517 (1952); **Garner v. Board of Public Works of City of Los Angeles,** 341, U.S. 716, 71 S. Ct. 909, 95 L.Ed. 1317 (1951). In **Adler** the Court said:

> 'That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.'

"The Supreme Court has also declared that fitness for teaching depends on a broad range of factors, and that there is no requirement in the Federal Constitution that classroom conduct must be the sole basis for fitness. **Beilan v. Board of Education,** 357 U.S. 399, 78 S. Ct. 1317, 2 L.Ed. 2d 1414 (1968). It is, of course, true that the Board's discretion may not be exercised in an arbitrary and capricious manner, nor may the Board exercise its discretion in a discriminatory manner. **Johnson v. Branch,** 364 F. 2d 177 (4th Cir. 1966); **Franklin v. County School Board of Giles County,** 360 F. 2d 325 (4th Cir. 1966), and cases cited therein. Given the plaintiff's admission that he had been convicted by the Municipal Court of public drunk-

enness and assaulting an officer and that his suspension was 'by reason of his alleged misconduct', his failure to allege or contend that the defendants had in any way colluded or conspired in that conviction or had any knowledge of any impropriety therein, we think the court had before it objective facts shown on the face of the complaint which support the discretionary action of the Board and which combined with his failure to notify the Board of any defense, constituted an insuperable bar to relief. Cf. **Legget v. Montgomery Ward & Co.,** 178 F. 2d 436 (10 Cir. 1949); **Bach v. Quiran,** 5 F.R.D. 34 (D.C.N.Y. 1945).

"We think these facts left no genuine issue of fact to be decided and even giving the plaintiff the benefit of all reasonable doubt, see Wright, Federal Courts, Pg. 387 (1963), the defendants were entitled to the summary judgment which the court granted."

Sindermann, as in **Bradford,** has "given" this court his "admission" that he was uncooperative with the administration and willfully disobedient. The admission leaves "no genuine issue of fact to be decided, and even giving Mr. Sindermann the benefit of all reasonable doubt", petitioners were entitled to their summary judgment. A contrary conclusion would require them to violate their duty under law, and invite the other 100 faculty members to disregard all administrative policy and authority.

The Civil Rights Statutes and the proper administration of public schools must be viewed in proper context. In **Ferrell v. Dallas Independent School**

District, et al, 392 F. 2d 697 (5th Cir. 1968), the school principal refused to enroll male students because they failed to comply with a school regulation banning long hair. The Fifth Circuit affirmed the district court, which had concluded that the school authorities had not acted arbitrarily, capriciously or unreasonably in refusing to admit the students.

Judge Gewin wrote:

"This case brings into focus a sensitive area of the law. Constitutional issues which arise under the Bill of Rights have been before the courts many times. The decided cases clearly demonstrate that each case must be decided in its own particular setting and factual background and within the context of the entire record before the court in determining whether the rule or the action about which complaint is made is arbitrary, capricious, unreasonable or discriminatory. This approach to the problem is clearly demonstrated by the authorities hereinafter cited as well as the following: **Thornhill v. State of Alabama,** 310 U.S. 88, 101, 60 S. Ct. 736, 84 L.Ed. 1093, 1102; **West Virginia State Board of Education v. Barnette,** 319 U.S. 624, 627, 63 S. Ct. 1178, 87 L.Ed. 1628, 1637; **Dennis v. United States,** 341 U.S. 494, 510, 71 S. Ct. 857, 868, 95 L.Ed. 1137, 1153; **Whitney v. People of the State of California,** 274 U. S. 357, 376, 47 S. Ct. 641, 71 L.Ed. 1095, 1106. In **Dennis v. United States,** supra, the Supreme Court approved, as a general rule, the following statement by Chief Judge Learned Hand.

> 'In each case (courts) must ask whether the gravity of the "evil", discounted by its

> improbability, justifies such invasion of free speech as is necessary to avoid the danger.'
>
> "The Constitution does not establish an absolute right to free expression of ideas, though some might disagree. The constitutional right to free exercise of speech, press, assembly, and religion may be infringed by the state if there are compelling reasons to do so.
>
> "The compelling reason for the State infringement with which we deal is obvious. The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the best education possible for its people must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right.

Just as in the **Ferrell** case, the Board of Regents was and is compelled by the Constitution of the State of Texas, Article 7, § 1, and the statutes of Texas, to adopt regulations for an efficient and effective system and to manage and govern the school consistent with such laws and Constitution. It has done nothing inconsistent with these state requirements nor to unconstitutionally infringe on Sindermann's rights in refusing to renew his contract. The Board has properly exercised its discretionary powers.

Contrary to what the opinion of the lower court seems to recognize, respondent has no absolute right to absent himself from and neglect his school classes for the purpose of attending a committee hearing

at a location over 300 miles away, particularly when the proposed legislation which allegedly prompted the absence was not brought before the legislative committee. The import of the opinion is contrary to **Bomar v. Keyes,** 162 F. 2d 136 (2d Cir. 1947), where the court stated at Pg. 139:

> "We do not mean to suggest that a teacher may absent herself from work indefinitely and serve on a jury without regard to her duty; i.e., that she may choose her own time or stay away as long as she pleases."

If there exists valid reasons for refusing to rehire Mr. Sindermann, i.e., his past attitude and conduct, then the parallel existence of invalid reasons, such as newspaper criticism of the administration, would not render nugatory the valid reasons — notwithstanding Sindermann's claim that the invalid reason was the **sole** cause of not being rehired. The valid reasons for not rehiring Mr. Sindermann cannot be erased by his own acts in other activities. If so, the most guilty could profit by simply engaging in offensive (but constitutionally guaranteed rights) and claiming the latter provoked the difficulty, and the former is thereby rendered immaterial.

It would be a severe handicap to colleges and the continued development of independent thought if the courts assumed the control and direction of the colleges, particularly in the selection of the faculty. The resulting problems to the schools and the courts might well be overwhelming. Respondent, through his past actions, has made himself patently unacceptable to the administration of an orderly, effective

college system. The petitioners concluded, in the exercise of a reasonable and sensible judgment, that it would not be in the best interest of the college to make a new contract with Mr. Sindermann. This action was based on adequate and sufficient, even compelling reason, and should be affirmed by this court. There is really no fact issue for determination, whether such hearing is before the trial court, a faculty committee or some other body. Respondent's own pleadings establish valid reasons for not granting him a new contract. The petitioners have not deprived respondent of any right or privilege secured by the Federal Constitution and Laws.

CONCLUSION

This Petition for Writ of Certiorari should be granted to the end that on review the Circuit Court of Appeals may be directed to reverse its judgment and the judgment of the trial court affirmed.

Respectfully submitted,

W. O. SHAFER
P. O. Drawer 1552
Odessa, Texas 79760

LUCIUS D. BUNTON
P. O. Drawer 1552
Odessa, Texas 79760

RAYMOND D. WIER
103 O'Michael Building
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS
BUNTON & McCOLLUM
P. O. Drawer 1552
Odessa, Texas 79760

Of Counsel

CERTIFICATE OF SERVICE

Three true and correct copies of the foregoing Petition for Cretiorari have been furnished counsel for Respondent, Mr. Warren Burnett, Post Office Box 3707, Odessa, Texas, 79760, by placing the same in the United States Mail, postage paid, Certified Mail, Return Receipt Requested, on this the 5th day of November, 1970.

W. O. Shafer

W. O. SHAFER,
Attorney for Petitioners

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28372

ROBERT P. SINDERMANN, for himself and others similarly situated,
Plaintiff-Appellant,

versus

CHARLES R. PERRY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

---

(August 10, 1970)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges

CLARK, Circuit Judge: The court below disposed of this case by summary judgment but because we find that this case presents issues of constitutional law, the longest way around now proves to be the

shortest way through the thicket. The Board of Regents of Odessa Junior College voted not to renew the employment contract of Professor Robert P. Sindermann. Sindermann filed suit in the district court alleging that the action of the Regents in refusing to offer him a new term of employment was based solely on his exercise of First and Fourteenth Amendment rights of expression, association and petition and alleging violations of due process in connection with this refusal. Finding the contract rights of the parties clear, the court granted a motion of defendants for summary judgment. Shortly after the summary judgment was appealed, this court decided **Pred v. Bd. of Public Instruction,** 415 F.2d 851 (5th Cir. 1969), which classifies the rights of persons circumstanced such as plaintiff as constitutional rather than contractual. **Pred** aligned this court with the 4th Circuit[1] and against the 10th Circuit[2] in this as yet unresolved conflict between circuits. This new development in decisional law, coming as it did after the decision of the court below, renders that court's summary judgment inappropriate and erroneous. We reverse for further development of the facts.

BACKGROUND:

Professor Sindermann became a member of the Odessa College faculty in September 1965, after previous college teaching experience. By a succession of one-year contracts he remained a faculty member until the end of the 1968-69 school year. On May 19, 1969 the college president notified Sindermann that

[1]Johnson v. Branch, 364 F.2d 177 (4th Cir. en banc, 1966), *cert. denied* 385 U.S. 1003, 87 S.Ct. 706, 17 L.Ed.2d 542 (1967).

[2]Jones v. Hopper, 410 F.2d 1323 (10th Cir. en banc, 1969), *cert. denied* ____ U.S. ____, 90 S.Ct. 1111, ____ L.Ed.2d ____ (1970)

the Regents had voted to approve the president's recommendation not to renew his contract for 1969-70. Sixteen days later Sindermann filed the present action and contemporaneously with the instigation of litigation, requested that he be given a hearing by college authorities. Apparently no such hearing has been afforded.

During the 1969-70 school term no member of the Odessa College faculty had any formal assurance of continuation of employment beyond the present school term.[3]

Shortly before official notice of the decision not to renew plaintiff's contract, the college issued an 11-page press release documenting the deterioration of its relationship with plaintiff. The highlights are reflected in this chronology from that document. The validity of Professor Sindermann's work with Odessa College was recognized by his nomination to be co-chairman of the Social Science Department with an increase in pay. As soon as he became co-chairman, he began to circularize lengthy letters to the members of his department. This resulted in his being dropped as co-chairman in the Fall of 1968 but with no corresponding reduction in salary. In February 1969 Sindermann was elected president of the Texas Jun-

[3]The official Faculty Guide published by the college contained the following paragraph:

> "*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

ior College Teachers Association.[4] Sindermann accepted this office without consultation with any administrative officer of Odessa College and immediately requested student clerical help, a reduction in teaching load and time off during winter months to visit other junior colleges, which had not been true with former faculty members who served in this same office. Sindermann also aligned himself with a group known as "The Committee to Elevate Odessa College", a group seeking to raise Odessa College to a 4-year status — a move officially opposed by the Board of Regents. Plaintiff's name appeared as sponsoring a newspaper advertisement ridiculing the position taken by the Board of Regents on Odessa College's 4-year status.[5]

On at least four occasions Sindermann requested permission from college officials to absent himself from the campus and his teaching duties in order to testify before committees of the Texas legislature on a bill relating to academic freedom and tenure. These requests were each refused but Professor Sindermann nevertheless attended the committee hearings. The press release concluded by quoting a telegram from Sindermann to a Senator which, in part, stated: "I have been fired from Odessa College for attempting to testify on S.B. 512." It noted however that Sindermann had not been officially advised that his con-

[4]The Faculty Guide indicated complete administration approval of this organization in the following language:

> *"Professional Memberships:* Odessa College faculty members pride themselves on one hundred percent membership each year in the Texas State Teachers Association and Texas Junior College Teachers Association."

[5]Sindermann disclaimed any connection with the advertisement but the press release held that his "guilt by association" could not be rejected because he allied himself with the Committee to Elevate Odessa College.

tract would not be renewed. The letter of "official" notification of non-renewal shortly followed the press release.

PLEADINGS AND PROCEEDINGS:

Sindermann's complaint alleged that his contract was not renewed in order to retaliate against him for expressions of opinion, that he was a competent classroom teacher, that he had not been offered an impartial hearing in connection with the non-renewal of his contract, that the action taken against him had a chilling effect on other professors at Odessa College, and that he had been damaged in his professional reputation and standing. He sought compensatory and punitive damages and attorneys fees, a declaratory judgment adjudicating that the Regents' action violated his constitutional rights and that he was entitled to a hearing under suggested procedural guidelines, and a mandatory injunction requiring his reinstatement for the 1969-70 college year at the same level of responsibility and function he had previously held. He named as defendants the members of the Board of Regents and the college president, individually and in their official capacity. The Board of Regents moved to dismiss the action insofar as they were sued in their official capacity. All defendants moved for summary judgment.

Only three affidavits were filed in the course of the pleadings. All were by the plaintiff, Sindermann. The first supported his motion for injunction, the second opposed summary judgment, the third verified the authenticity of the exhibits to his complaint. After

denying the motion to dismiss,[6] the court granted defendants' motion for summary judgment on the basis of the findings and conclusions set out in the margin.[7]

SUMMARY JUDGMENT:

Pred v. Bd. of Public Instruction, supra, invalidates the basic legal premise of the Court's summary judgment. There we said:

> 'Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any rights protected by § 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractural one, nor could it be since no **right** to reemployment existed. What is at stake is the vindication of constitutional rights — the right not to be punished by the State or to suffer retaliation at its hand because a public

[6]This action was correct. Harkless v. Sweeny Independent School District, ____ F.2d ____ (5th Cir. 1970) (No. 28188, June 2, 1970).

[7]*Findings:*

"I. Plaintiff's tenure of employment ended May 31, 1969.
"II. Odessa Junior College has no tenure system which fact was known to the Plaintiff at the time he entered into his original contract with the college.
"III. After the termination of his contract of employment the Defendant college owed no obligation to the Plaintiff."

Conclusions:

"I. Plaintiff has no cause of action against the Defendants since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system.
"II. Plaintiff has no contract with the Defendant college.
"III. Plaintiff has no right which would require Defendants to execute a contract with Plaintiff, or to employ Plaintiff.
"IV. Defendants have not violated any constitutional rights of the Plaintiff."

employee persists in the exercise of First Amendment rights." (415 F.2d at 856).

See also Orr v. Thorpe, ... F.2d ..... (5th Cir. 1970) (No. 27674, June 10, 1970).

In a legally analogous situation, the Supreme Court has made it clear that even the broad discretion vested in a State government to fix municipal boundaries cannot be used as an instrument to circumvent constitutionally protected rights and that where constitutional wrongs are perpetrated in the guise of fixing city limits, the breadth of the legislative power being exercised provides no insulation from judicial correction. **Gomillion v. Lightfoot,** 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

The controlling effect of **Pred** is in nowise lessened by the circumstances in the case at bar that Sindermann requested permission to be absent from his teaching duties to exercise constitutional rights, that such permission was refused and that he deliberately disobeyed administrative directions. The inquiry still comes back to be whether the college refused to renew the teaching contract on an impermissible basis — as a reprisal for the exercise of constitutionally protected rights. We reject the sophistry which would recognize that the college could not withhold renewal of Sindermann's contract because of his association with the Committee to Elevate Odessa College or because of his exercise of a reasonable right to petition the legislature by attending committee hearings but, at the same time, recognize a right in the college administration to direct him not to exercise these rights then refuse to renew his contract for disobedience of

their orders. **Compare Sheldon v. Tucker,** 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

However, a valid distinction might be drawn between a dismissal on bare bones pleadings as was involved in **Pred,** and a disposition on summary judgment as in the case sub judice. This Court has affirmed the use of summary judgment to dispose of constitutional issues, **Hawthorne v. United States,** 115 F.2d 805 (5th Cir. 1940), see also **Dawkins v. Green,** 285 F.2d 772 (N.D. Fla. 1968), but this form of disposition is often inappropriate in cases involving issues of far-flung import. **Compare Hall v. Garson,** ..... F.2d ..... (5th Cir. 1970) (No. 29690, July 22, 1970) Part II B; **Kennedy v. Silas Mason Co.,** 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948); and **Dispatch, Inc. v. City of Erie,** 364 F.2d 539 (3rd Cir. 1966). It was totally inappropriate in the case at bar, where the only affidavits on which summary judgment was based were submitted by the plaintiff and where there was a clear offer to prove facts constituting a constitutional claim. **Whitaker v. Coleman,** 115 F.2d 305 (5th Cir. 1940). Summary judgment should be granted only when the truth is clear, where the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. **Cole v. Chevron Chemical Co.,** ..... F.2d ..... (5th Cir. 1970) (No. 29032, June 10, 1970). While there was no dispute about the facts underlying Sindermann's contract status with Odessa College, the truth of his constitutional position was far from clear. The basic facts, as well as the material inferences to be drawn therefrom, were in total dispute. Summary

judgment was improper. We explicitly note that we deal only with procedures and not with the merits. The remand for factual explication is made with no intimation whatsoever as to what outcome such further development should produce.

ACADEMIC HEARING PROCEDURES:

Since the case must be remanded, it is appropriate that we comment on plaintiff's contention that the college denied him procedural due process by simply announcing that he would not be rehired and failing or refusing to give him a hearing.

Before specifying what procedural devices ought to be available to Professor Sindermann at the collegiate level, a determination must be made as to whether the teacher involved has tenure or an expectancy of re-employment under the policies and practices of the institution. **See Ferguson v. Thomas,** F.2d (5th Cir. 1970) (No. 28227, June 23, 1970) and **Greene v. Howard University,** 412 F.2d 1128 (D.C. Cir. 1969). The factual development of the record in its present posture is too scanty for this court to decide whether this second alternative applies to Sindermann.[8] After the facts are developed, if the trial court should conclude that Sindermann did have an expectancy of reemployment,

---

[8]The "Teacher Tenure" statement, supra n. 3, creates at least some doubt in this court's mind as to whether this institution might have failed in its apparent attempt to secure the best of both worlds — attracting teachers who think they will be free from annual reemployment pressures, while at the same time retaining broad discretion to make or refuse a new contract each year. The Faculty Guide also sets out "Criteria for Retention of Teaching Personnel" which add to the uncertainty.

then the applicable notice and hearing standards are now established in **Ferguson.**

On the other hand, if the court resolves that Sindermann did not have an expectancy of reemployment which would require the college to show cause for the decision not to renew his contract, a different procedure would be indicated. In such a situation, upon receipt of notice that a new contract will not be offered, the teacher must bear the burden both of initiating the proceedings and of proving that a wrong has been done by the collegiate action in not rehiring him. It is incumbent upon such a teacher, not the college, to shoulder these responsibilities because the college may base its decision not to reemploy a teacher without tenure or a contractual expectancy of reemployment upon any reason or upon no reason at all. **Bomar v. Keyes,** 162 F.2d 136 (2nd Cir. 1947). **Cf. Smith v. Board of Regents,** ..... F.2d ..... (5th Cir. 1970) (No. 28159, May 26, 1970).

A requirement such as plaintiff suggests, that a college must always assign a cause for not renewing the contract of any teacher on its staff, would have the legal effect of improperly denying to colleges freedom of contract to employ personnel on a probationary basis or under annual contracts which are unfettered by any reemployment obligation. Every teacher would thus be granted substantial tenure rights by court edict. Courts do not make contracts for colleges or teachers any more than for any other litigants.

Upon receipt of the college's notice that it will not renew his contract, if a teacher determines to assert that such non-renewal is really a form of punishment

for his exercise of constitutional rights or otherwise constitutes some actionable wrong, the teacher should notify the institution with reasonable promptness of his claim in sufficient detail to fairly enable the institution to show any error that may exist and request a hearing. Upon the receipt of this notice and request the institution should constitute a tribunal to conduct such a hearing that both possesses some academic expertise and has an apparent impartiality toward the charges.

This hearing must include the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition.[9] Of course the whole point of the academic process is lost unless the hearing affords a meaningful opportunity to develop a record which can, if necessary, later form a substantial part of any court proceeding — a transcript which should demonstrate that the academic tribunal based its decision upon matters adduced before it. This is not so just to accommodate court procedures. More importantly, it is the process best calculated to reach a fair accord and to settle the problems which have arisen between the parties. After all, the candid settlement of differences that arise between men is the essence of civil justice for which we strive.

It has been indicated to this court that the college administration was served with this court's subpoena

[9]In Mack v. Florida State Board of Dentistry, ____ F.2d ____ (5th Cir. 1970) (No. 28085, July 7, 1970), we noted that while administrative hearings are not to be conducted with the formalities and strictures of a court trial, they should not be allowed to degenerate into an ungoverned confrontation. The virtues of having a presiding officer with legal training if the parties are represented by counsel, is equally apropos here.

before it received any request for a hearing from Professor Sindermann. If this be correct, then he may have "jumped the gun" in filing the present litigation. School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination.

Except in cases where the teacher or the institution refuses to follow these suggested procedures or the positions of the parties are such as to demonstrate that following such procedures would be a needless waste of time (a finding which the trial court may, on remand, deem appropriate in this case), a court whose jurisdiction is invoked ordinarily should stay its hand until the matter has been made ripe for court adjudication by allowing such procedures to function. [10] If at the conclusion of the academic processes the matter must still come before the court for review, the presentation there arrives buttressed with the record developed before the academic agency, which is entitled to great weight.

CONCLUSION:

This action was brought as a class action on behalf of Professor Sindermann and "on behalf of many of the Odessa Junior College faculty members too numerous to join herein, who have been intimidated and

---

[10] See *Ferguson*, supra, and Stevenson v. Board of Education, ____ F.2d ____ (5th Cir. 1970) (No. 28875, May 26, 1970).

harassed by the Defendants, or their agents, for expressing their opinions, and on behalf of many Odessa Junior College faculty members too numerous to join herein, who have become fearful and reluctant to express their opinions because of the conduct of the Defendants as described herein." However, no party before this Court has raised the propriety or impropriety of the class action aspects of this suit under Rule 23, Fed. R. Civ. P. See C. Wright, Federal Courts, § 72, pp. 306-317 (2d ed. 1970); also **Carpenter v. Davis,** ..... F.2d ..... (5th Cir. 1970) (No. 27686, April 9, 1970) and **Eisen v. Carlisle & Jacquelin,** 391 F.2d 555 (2nd Cir. 1968). We therefore make no adjudication whatever on this question.

The summary judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 28372

D. C. Docket No. P-69-CA-54

ROBERT P. SINDERMANN, for himself and others similarly situated,
Plaintiff-Appellant,

versus

CHARLES R. PERRY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court

for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 10, 1970

Issued As Mandate:

APPENDIX C

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28372

ROBERT P. SINDERMANN, for himself and others similarly situated,
Plaintiff-Appellant,

versus

CHARLES R. PERRY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

(September 9, 1970)

ON PETITION FOR REHEARING

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

FILE COPY

FILED
JUN 14 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~959~~ 70-31

CHARLES R. PERRY, ET AL., *Petitioners,*

v.

ROBERT P. SINDERMANN, for himself and for all others similarly situated, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN RESPONSE TO THE PETITION

DAVID RUBIN
Deputy General Counsel
National Education Association
1201 - 16th Street, N. W.
Washington, D.C. 20036

RICHARD J. MEDALIE
ALVIN FRIEDMAN
Epstein, Friedman and Duncan
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for the National Education Association

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 952

CHARLES R. PERRY, ET AL., *Petitioners,*

v.

ROBERT P. SINDERMANN, for himself and for all others similarly situated, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN RESPONSE TO THE PETITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the National Education Association (NEA) and respectfully moves this Court, pursuant to Rule 42, paragraph 3, of the Rules of this Court,

for leave to file the accompanying brief as *amicus curiae* in this case.

The interest of the NEA and its reasons for asking leave to file a brief *amicus curiae* are set forth in the accompanying brief.

Respectfully submitted,

DAVID RUBIN
Deputy General Counsel
National Education Association
1201 - 16th Street, N. W.
Washington, D. C. 20036
202/833-4451

RICHARD J. MEDALIE
ALVIN FRIEDMAN
Epstein and Friedman
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
202/628-7234

Attorneys for the National Education Association

INDEX

	Page
Opinion of the Court Below	2
Questions Presented	2
Interest of the National Education Association as Amicus Curiae	3
Statement	4
Reasons for Granting the Writ	10
I. There Is a Conflict Among the Circuits on the Issue Whether a Nontenured Teacher's Allegation That His Contract Was Not Renewed Because He Exercised First Amendment Rights Is Sufficient To State a Claim Under the Civil Rights Act	10
II. There Is a Conflict Among the Circuits on the Issue Whether the Nonrenewal of a Nontenured Teacher's Contract Without Prior Written Notice and Hearing Violates His Rights to Procedural Due Process Under the Fourteenth Amendment	14
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Bomar v. Keyes, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947)	13
DeCanio v. School Committee of Boston, 260 N.E. 2d 676 (Mass. 1970), *jurisdictional statement filed sub nom.* Fenton v. School Committee of Boston, No. 1026, Sup. Ct., O.T. 1970, Nov. 30, 1970	16
Drown v. Portsmouth School Dist., Dkt. No. 7667, 1st Cir. (appeal pending)	3, 16

Page

Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970) 14
Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969) 15
Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967) 11, 12, 13
Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970) 3, 11, 12, 13
Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970) 14, 15
McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) .. 13
Munro v. Elk Rapids Schools, Dkt. No. 52508, Sup. Ct. Mich., Jan. 24, 1970, *rehearing granted*, Nov. 30, 1970 16
Orr v. Trinter, Dkt. No. 20721, 6th Cir. (appeal pending) 3, 16
Parker v. Board of Educ., 237 F.Supp. 222 (D. Md.), *aff'd.*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966) 11, 12, 15
Pred v. Board of Pub. Instr., 415 F.2d 851 (5th Cir. 1969) 10, 11, 12, 13
Roth v. Board of Regents, Dkt. No. 18490, 7th Cir. (appeal pending) 3, 16
Shrick v. Thomas, Dkt. No. 18790, 7th Cir. (appeal pending) 16
Sindermann v. Perry, 430 F.2d 939, Pet. App. A (5th Cir. 1970) 2, 4, 5, 6, 9, 10, 11

CONSTITUTION AND STATUTES:

Constitution of the United States, First Amendment 2, 5, 9, 13
Constitution of the United States, Fourteenth Amendment 3, 5, 9
Civil Rights Act of 1871, 42 U.S.C. § 1983 ..... 2, 5

OTHER MATERIAL:

Brief of NEA in Support of the Petition, Jones v. Hopper, 397 U.S. 991 (1970) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 952

CHARLES R. PERRY, ET AL., *Petitioners,*

v.

ROBERT P. SINDERMANN, for himself and for all others similarly situated, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN RESPONSE TO THE PETITION

The National Education Association of the United States (NEA), upon motion seeks to appear as *amicus curiae* in the present case.[1] In the court below, NEA

[1] A letter from counsel for petitioners consenting to NEA's participation as *amicus curiae* has been filed with the Clerk of this Court. Counsel for respondent, however, upon instructions from respondent, have not consented to NEA's participation as *amicus curiae*.

appeared as *amicus curiae* in support of the respondent on the merits. NEA appears in this Court at the present stage of the proceedings to urge that the writ of certiorari be granted because of the direct conflict among decisions of the courts of appeals on the constitutional issues involved and because of the great importance of these constitutional issues.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet.[2] App. A) is reported at 430 F.2d 939 (1970). The findings and conclusions of the United States District Court for the Western District of Texas (R. 99-101)[3] are set forth in footnote 7 of the opinion of the Court of Appeals (Pet. App. A, at 6 n. 7).[4]

QUESTIONS PRESENTED

This case, brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, raises two constitutional issues:

1. Whether a complaint by a nontenured teacher in a public educational institution, alleging that the teacher's contract was not renewed because he exercised First Amendment rights of expression, association and petition, states a claim under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, upon which relief can be granted.

---

[2] "Pet." refers to the Petition for a Writ of Certiorari herein.

[3] "R." refers to the Appendix in the Fifth Circuit.

[4] "Jurisdiction" and "Constitutional Provisions and Statutes Involved" are as set forth in the Petition (at 2, 3-5).

2. Whether a nontenured teacher's rights of procedural due process under the Fourteenth Amendment are violated when a public educational institution, in refusing to renew the teacher's contract, fails to provide the teacher with notice and the opportunity for a hearing.

INTEREST OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

The NEA has a special interest in the issues presented here. NEA was founded in 1857 and chartered as a non-profit corporation by act of Congress in 1906. Its membership includes more than one million professional educators, many of whom are nontenured teachers. Its charter purpose is to improve the character and advance the interest of the teaching profession and the cause of education in the United States.

To this end, NEA has appeared as *amicus curiae* during 1970 not only before the court below in the present case, but also before this Court in *Jones* v. *Hopper,* 397 U.S. 991 (1970), *denying cert.,* 410 F.2d 1323 (10th Cir. 1969), and in a number of cases now pending on appeal in other federal courts of appeals, which, although involving different facts, raise essentially the same legal issues as are presented here. *See Drown* v. *Portsmouth School District,* Dkt. No. 7667, 1st Cir.; *Orr* v. *Trinter,* Dkt. No. 20721 (6th Cir.); *Roth* v. *Board of Regents,* Dkt. No. 18490 (7th Cir.).

NEA has also established a fund for the protection of teacher rights, known as the "DuShane Fund," through which it has supported cases across the nation, raising issues which are the same as, or similar to, those raised in the present case.

Because NEA is an organization of professional educators and has been deeply involved in cases comparable to the present case, it has gained special background, experience and competence which it desires to bring to bear on the issues raised by the present case.

For the foregoing reasons, NEA requests leave to appear as *amicus curiae* to urge that certiorari be granted. Should the writ issue, NEA will seek to appear in support of the respondent on the merits of the issues raised.

STATEMENT

The respondent, Robert P. Sindermann, was initially employed as a lecturer for the academic year 1965-66 to teach Government in the Department of Social Science at Odessa Junior College, Odessa, Texas ("the College")—part of the public educational system of the State of Texas. He previously had taught for four years at San Antonio Junior College, San Antonio, Texas, and for over two years at the University of Texas, both of which are also state educational institutions (*see* R. 13). In addition to his teaching duties at the College, respondent also served as co-chairman of the Social Science Department until the fall of 1968.

By a succession of one-year contracts, Sindermann continued as a faculty member of the College until the end of the 1968-69 academic term (Pet. App. A, at 2). On May 19, 1969, respondent, without any advance written notice and without a prior hearing, received from petitioner Charles R. Perry, the President of the College, a letter informing him that his teaching contract would not be renewed for the next academic year (*see* R. 87). The letter stated (R. 41): "The Board of Regents on May 6, 1969, voted to

approve my recommendation not to renew your contract for 1969-70. You have been supplied with a statement, with attachments, indicating the basis for this recommendation." The "statement" referred to was a public press release issued by the President's office on May 13, 1969.[5]

Three days thereafter, respondent brought suit against the President and Board of Regents of the College, claiming a deprivation of civil rights in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983. The Complaint alleged that the refusal of the College authorities to renew respondent's contract was based solely on his exercise of First and Fourteenth Amendment rights of expression, association, and petition and that, in connection with this refusal, his rights to procedural due process had been violated (*see* Pet. App. A, at 2).

As characterized by the court below, the reasons for respondent's contract nonrenewal were as follows (Pet. App. A, at 4):[6]

---

[5] The press release is reprinted in its entirety as Appendix A to the original Complaint (R. 13-25).

[6] Neither in the pleadings nor in any other part of the record before the district court did the petitioners assert that the refusal to renew respondent's contract to teach rested upon the Board of Regents' judgment that respondent was "incompetent" or otherwise incapable of instructing in the subjects assigned to him. On the contrary, a statement dated May 15, 1969, and signed by most of the faculty of the College's Social Science Department attested that plaintiff "is a totally competent person professionally" and that "nothing that he has said or done has, in any way, derogated from his competence in the classroom as a lecturer in Government" at the College (R. 40). The court of appeals observed that "[t]he validity of Professor Sindermann's work . . . was recognized by his nomination to be co-chairman of the Social Science Department with an increase in pay" (Pet. App. A, at 3).

(1) "Sindermann . . . aligned himself with a group known as 'The Committee to Elevate Odessa College', a group seeking to raise Odessa College to a 4-year status—a move officially opposed by the Board of Regents."

(2) "Plaintiff's name appeared as sponsoring a newspaper advertisement ridiculing the position taken by the Board of Regents on Odessa College's 4-year status."[7]

(3) "On at least four occasions Sindermann requested permission from college officials to absent himself from the campus and his teaching duties in order to testify before committees of the Texas legislature on a bill relating to academic freedom and tenure. These requests were each refused but Professor Sindermann nevertheless attended the committee hearings."

This last reason derives from respondent's election as President of the Texas Junior College Teachers Association in February 1969 (R. 14, 84). As President, Sindermann was invited to testify in April 1969 (R. 38, 39) at hearings of the Senate State Affairs Committee of the Texas State Legislature on pending legislation relating to academic freedom and tenure (R. 84-85). On April 9, Sindermann requested permission from the Chairman of his Department to be absent from classes on April 23 in order to appear before the legislative committee (*see* R. 18). He had stated that substitute teachers were available and that he would reimburse the College for any expense incurred for the substitute teachers.

---

[7] The court below also observed that "Sindermann disclaimed any connection with the advertisement but the press release held that his 'guilt by association' could not be rejected because he allied himself with the Committee to Elevate Odessa College" (Pet. App. A, at 4 n. 5; *see* R. 17).

On April 10, the President of the College denied respondent's request on the grounds that he could contribute to the College "only by being present to teach," that the Teachers' Association should be represented at the legislative hearing by the Association's Legislative Committee Chairman and not by its President, and that the Association had not endorsed the pending bill on which respondent was to testify (R. 18-19). These grounds were restated by the President directly to respondent on April 22, the day before he was to appear before the legislative committee (R. 21). Respondent was nonetheless absent from his classes on April 23 in order to testify before the Committee, and his classes were taught on that day by substitute teachers (*id.*).

On April 25, respondent requested permission to absent himself again from classes in order to testify before the legislative committee. Once more, he pointed to the availability of substitute teachers and his willingness to reimburse the College for any expense. Respondent's request was denied on April 26 (R. 21). On April 27, he informed the Chairman of the Social Science Department that he would be absent from classes on April 28 in order to testify at the legislative committee hearing (R. 22).

Subsequent to Board action on May 6th, in which respondent's contract was not renewed, but prior to the May 19th notice, respondent requested two further absences to testify before the legislature in May. These requests were also refused (R. 23-25).

On the basis of these incidents, Sindermann alleged in his Complaint (R. 6) and Amended Complaint (R. 85), and petitioners admitted in their answers (R. 46, 51, 56), "that one of the reasons for the

Plaintiff not being retained for the academic year 1969-1970 was his unauthorized trip to Austin, Texas, to testify without receiving the college Administration's approval."

At the time respondent was absent from classes to testify before the legislative committee, there was in effect at the College a regulation governing approved and authorized absences by faculty members and the manner in which unauthorized and unapproved absences were to be treated. This regulation, appearing in the "Faculty Guide of Odessa College," promulgated by the administration of the College, stated (Complaint, App. G, at 52-53, emphasis added):

> "*Faculty Absences:*
>
> . . . . .
>
> "Arrangements for absence with full pay shall be made in advance by the employee. Approval for absence because of personal or family illness shall be granted by the departmental chairman and the Dean of the College. Approval of absence for other causes shall be obtained from the Dean of the College and subject to final approval by the President. *The employee shall have 1/180 of his annual salary deducted for each day of such absence not approved by the departmental chairmen, the Dean of the College, or the President.*"

In his Complaint, Sindermann claimed that the nonrenewal of his contract, unless restrained, would cause him "damages to his professional reputation and standing," and that he had already suffered "actual damages to his reputation" and "to his ability to obtain similar employment in other colleges in the State of Texas" (R. 89). Respondent thus requested the trial court, *inter alia,* to declare that his contract

nonrenewal was a violation of his substantive rights under the First and Fourteenth Amendments and of his procedural due process rights under the Fourteenth Amendment, to require the Board of Education to grant him "a hearing on the reasons for his dismissal," including formal written charges, and to direct the Board to reinstate him as a member of the faculty (R. 90, 93).

Petitioners filed a Motion for Summary Judgment (R. 66-75), alleging, *inter alia* (R. 73):

> "Not only has [respondent] flaunted his insubordination before his superiors at the College, but he now flaunts that same insubordination before this Court by pleading affirmatively his willful disregard of written instructions of his superiors. The matter is one solely and entirely of discipline for insubordination. As a matter of law, the insubordination is . . . adequate and sufficient reason for the nonrenewal of this contract . . . ."

The district court granted the motion (R. 99-101; Pet. App. A, at 6 n. 7), relying on its determination that respondent's contract with the College had terminated by its terms at the end of the 1969 school year, that respondent had no tenure at the College, that the College had no contractual obligation to renew respondent's contract, and that the College authorities had therefore not violated any of his constitutional rights.

On appeal, the Fifth Circuit reversed the lower court's ruling on the grounds that the rights sought to be enforced by respondent—rights derived from the First and Fourteenth Amendments—were constitutional rather than contractual and that therefore

summary judgment should not have been granted. With respect to petitioners' argument that Sindermann's "insubordination" was the reason for their nonrenewal of his contract, the court stated (Pet. App. A, at 7):

> "We reject the sophistry which would recognize that the college could not withhold renewal of Sindermann's contract because of his association with the Committee to Elevate Odessa College or because of his exercise of a reasonable right to petition the legislature by attending committee hearings but, at the same time, recognize a right in the college administration to direct him not to exercise these rights then refuse to renew his contract for disobedience of their orders."

The appellate court below further specified certain minimum requirements of procedural due process that the College authorities had failed to follow in deciding not to renew respondent's teaching contract. The court entered judgment (Pet. App. B) remanding the cause for further proceedings consistent with its opinion.

REASONS FOR GRANTING THE WRIT

I

There Is a Conflict Among the Circuits on the Issue Whether a Nontenured Teacher's Allegation That His Contract Was Not Renewed Because He Exercised First Amendment Rights Is Sufficient To State a Claim Under the Civil Rights Act.

In reversing the trial court's entry of summary judgment for the school authorities on the ground that respondent Sindermann had no tenure or contract rights upon which he could base his claim, the Fifth Circuit relied upon its previous decision in *Pred* v.

Board of Pub. Instr., 415 F.2d 851 (1969), "which classifies the rights of persons circumstanced such as plaintiff as constitutional rather than contractual" (Pet. App. A, at 2).

This fundamental difference in approach, according to the court below, has created an "as yet unresolved conflict between circuits" (*id.*), aligning the Fifth Circuit by its decisions in *Sindermann* and *Pred* with the Fourth Circuit in *Johnson* v. *Branch*, 364 F.2d 177 (1966) (en banc), *cert. denied*, 385 U.S. 1003 (1967), and against the Tenth Circuit in *Jones* v. *Hopper*, 410 F.2d 1323 (1969) (en banc), *cert. denied*, 397 U.S. 991 (1970). The Fifth Circuit's decisions, as well as the Fourth Circuit's decision in *Johnson*, are also in direct conflict with an earlier opinion of the Fourth Circuit—*Parker* v. *Board of Educ.*, 348 F.2d 464, *affirming* 237 F. Supp. 222 (D. Md. 1965), *cert. denied*, 382 U.S. 1030 (1966), a case similar to *Jones*.

The facts of the *Jones* case closely parallel those of the present case. Professor Jones was an untenured associate professor at Southern Colorado State College. He alleged in his Complaint that, in February 1966, he had received "notice that his services would be terminated at the end of the academic year by a letter sent from the President and authorized by the Board" (410 F.2d at 1326): Professor Jones further alleged that he "was not reappointed . . . because he had exercised his constitutionally protected rights" of speech, publication and religion (*id.*).

On motion by the school authorities, the district court dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted. The Tenth Circuit affirmed, en banc (two

judges dissenting), on the ground that the complaint alleged no "identified interest" protected by the Constitution (*id.* at 1328) since the contract had expired by its own terms and the professor had no tenure.[8]

In contrast, the appellate court in the present case rejected the reasoning of *Jones* v. *Hopper* and instead relied on its own reasoning in *Pred* and the Fourth Circuit's reasoning in the *Johnson* case. The *Pred* and *Johnson* cases make clear that a teacher's constitutional rights are not dependent on the existence of a contractual right. As stated in *Pred* (415 F.2d at 856):

> "Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any rights protected by § 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractual one, nor could it be since no *right* to reemployment existed. What is at stake is the vindication of constitutional rights—the right not to be punished by the State or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendment rights."

---

[8] The Fourth Circuit in *Parker* similarly stated (348 F. 2d at 465): "We need not pass on the merits of the Fifth, Fourteenth and First Amendment deprivations and abridgement asserted by the Appellant, consisting of the Board's termination of his employment (1.) without a hearing and (2.) because of his instruction from a book which he said had been proscribed by the Board in violation of freedom of speech. Our decision rests entirely on the contract. By its terms Parker was only employed provisionally and wholly without academic tenure express or implied."

Similarly, in *Johnson*, the Fourth Circuit stated (364 F.2d at 179):

> "There is no vested right to public employment. No one questions the fact that the plaintiff had neither a contract nor a constitutional right to have her contract renewed, but these questions are not involved in this case. It is the plaintiff's contention that her contract was not renewed for reasons which were either capricious and arbitrary or in order to retaliate against her for exercising her constitutional right to protest racial discrimination."[9]

This Court is thus presented with a serious and open conflict of circuits on the First Amendment issue. Since numerous cases raising First Amendment issues parallel to that presented here are now pending in or have recently been decided by the lower federal courts,[10] the need to resolve the conflict is pressing.

---

[9] The Seventh Circuit also aligns itself with the Fourth and Fifth Circuits in *Johnson* and *Pred*, and rejects the Tenth Circuit's reasoning in *Jones*. McLaughlin v. Tilendis, 398 F.2d 287, 289 (7th Cir. 1968): "[Even though the teachers involved] did not yet have tenure, the Civil Rights Act of 1871 gives them a remedy if their contracts were not renewed because of their exercise of constitutional rights. *Cf.* Bomar v. Keyes, 162 F.2d 136, 139 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947).

[10] For a partial listing of these First Amendment cases, *see* Brief of the NEA in Support of the Petition, App. 1a-4a, Jones v. Hopper, 397 U.S. 991 (1970).

II

There Is a Conflict Among the Circuits on the Issue Whether the Nonrenewal of a Nontenured Teacher's Contract Without Prior Written Notice and Hearing Violates His Rights to Procedural Due Process Under the Fourteenth Amendment.

The Complaint further alleged that the failure of the school authorities to provide respondent with proper notice and hearing on the nonrenewal of his contract had violated his rights to procedural due process. Building upon its previous decisions in *Ferguson* v. *Thomas*, 430 F.2d 852 (1970), and *Lucas* v. *Chapman*, 430 F.2d 945 (1970), the Fifth Circuit held in effect that Sindermann had a right to a hearing on the nonrenewal of his contract.[11] Such a hearing, said the court below, "must include the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition" (Pet. App. A, at 11).

The position taken by the Fifth Circuit in the present case, and in its previous decisions in *Ferguson* and

---

[11] The court of appeals remanded the case for the lower court to determine whether Sindermann had what it termed to be "an expectancy of reemployment" (Pet. App. A, at 9). If he had such an expectancy, the court held, the College authorities would be required to give him proper notice and hearing (*id.* at 9-10) as specified by the Fifth Circuit's opinion in Ferguson v. Thomas, 430 F.2d 852, 856-57 (1970). If the trial court determined that Sindermann did not have an expectancy of reemployment, however, under the decision below, the College authorities would still have to give Sindermann a hearing because of his claim that his contract nonrenewal was "really a form of punishment for his exercise of constitutional rights" (Pet. App. A, at 10-11). NEA believes that the Fifth Circuit's concept of "expectancy of reemployment" is based on certain misconceptions and misinterpretations of decisional authority which utilize a *quasi-contract* or *tort* theory to define the outer limits of a *constitutional* interest to be protected. An analysis of this problem, however, is best left to briefs and arguments on the merits.

Lucas, conflicts with the position taken by the Eighth Circuit in *Freeman* v. *Gould Special School Dist.*, 405 F.2d 1153 (en banc), *cert. denied*, 396 U.S. 843 (1969), as well as by the Fourth Circuit in *Parker* v. *Board of Educ.*, 348 F.2d 464, *affirming* 237 F. Supp. 222 (D. Md. 1965), *cert. denied*, 382 U.S. 1030 (1966), both of which also involved the nonrenewal of nontenured teachers' contracts.

In the present case, petitioners have argued that the nonrenewal of Professor Sindermann's contract had been a "matter . . . solely and entirely of discipline for insubordination" (R. 73). In the Eighth Circuit, this reason would presumably have been sufficient to deny Professor Sindermann any rights of procedural due process, for, as the court stated in *Freeman:* "Absent statutory or contractual requirements, persons discharged for inefficiency, incompetency, or insubordination have no constitutional right to a hearing with rights of cross-examination and confrontation of witnesses" (405 F.2d at 1161).[12] In contrast, the Fifth Circuit in *Lucas* had stressed that, if school authorities assert "a non-constitutional reason and the teacher claims it is a sham and that the real reason is one impinging on his constitutional rights, he must be afforded a hearing" (430 F.2d at 948).

---

[12] In *Parker*, the Fourth Circuit held that, regardless of the reason, no probationary teacher is entitled to a hearing upon termination of his contract (348 F.2d at 465). As articulated by the trial court in *Parker:* "[U]nless there is a statute to the contrary, probationary teachers' contracts may be terminated by the school authorities at the end of any contract year prior to the time tenure is gained, with or without cause and without a hearing" (237 F.Supp. at 227).

The position taken by the Fifth Circuit is also in conflict with numerous decisions of State Supreme Courts. *See, e.g., DeCanio* v. *School Committee of Boston,* 260 N.E.2d 676 (Mass. 1970), *jurisdictional statement filed sub nom. Fenton* v. *School Committee of Boston,* No. 1026, Sup. Ct., O.T. 1970, Nov. 30, 1970; *Munro* v. *Elk Rapids Schools,* Dkt. No. 52508, Sup. Ct. Mich., Jan. 24, 1970, *rehearing granted,* Nov. 30, 1970. As stated in *DeCanio* (Jur. St.,[13] App. 8a): "Most of the cases in which the question has been considered have concluded that in the absence of a statute to the contrary a probationary teacher may be dismissed without a hearing."

There is a vital need for resolving the present conflict among the circuits, as well as between the Fifth Circuit and the highest courts of several states, as to the requirements of procedural due process in cases involving the nonrenewal of a nontenured teacher's contract. This issue constantly arises in teacher contract termination cases. At the present time, NEA is aware of at least four cases pending on appeal in the federal courts of appeals in which school authorities, without notice or hearing, had refused to renew the contracts of nontenured teachers. *Drown* v. *Portsmouth School District,* Dkt. No. 7667, 1st Cir.; *Orr* v. *Trinter,* Dkt. No. 20721, 6th Cir.; *Roth* v. *Board of Regents,* Dkt. No. 18490, 7th Cir.; *Shirck* v. *Thomas,* Dkt. No. 18790, 7th Cir. Many more of these cases are pending in the federal district courts. It is reasonable to assume that, unless certiorari is granted in the present case so that the decisional conflict on the procedural due process issue may be resolved, there will be an increasing flow of petitions to this Court for

[13] Reference is to the Jurisdictional Statement in Fenton v. School Committee of Boston, *supra.*

review of the very same issue, not only in the four named cases described, but also in cases yet to come.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DAVID RUBIN
Deputy General Counsel
National Education Association
1201 - 16th Street, N.W.
Washington, D. C. 20036
202/833-4451

RICHARD J. MEDALIE
ALVIN FRIEDMAN
Epstein, Friedman and Duncan
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036
202/628-7234

Attorneys for the
National Education Association

December 1970.

FILE COPY

No. 70-36

JUN 4 1971

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~952~~

CHARLES R. PERRY, ET AL.,
Petitioners,

vs.

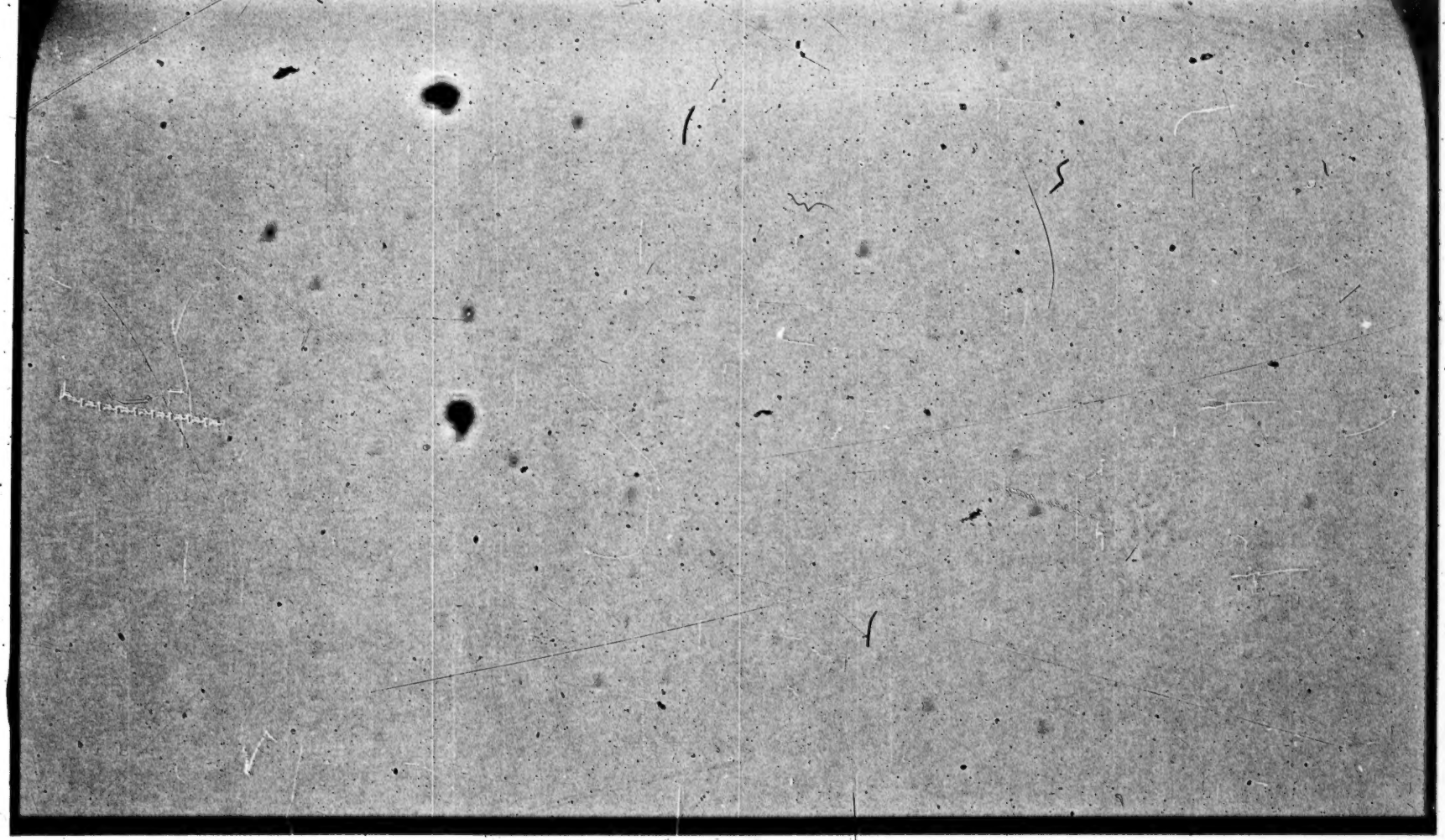
ROBERT P. SINDERMANN, for himself and for all others similarly situated,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

LAW OFFICES BURNETT & CHILDS
WARREN BURNETT
P. O. Box 3707
Odessa, Texas 79760
Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030



INDEX

Opinion of the Court Below 2
Questions Presented 2
Statement 3
Reasons for Denying the Writ 3
Argument 6
Conclusion 7
Certificate of Service 8

Table of Authorities

Bomar v. *Keyes*, 162 F.2d 136 (2d Cir., 1947) 7
Ferguson v. *Thomas*, 430 F.2d 852 (1970) 6
Johnson v. *Branch*, 364 F.2d 177 (1966), cert. den. 385 U.S. 1003 7
Jones v. *Hopper*, 410 F.2d 1323 (1969) 6
Lucas v. *Chapman*, 430 F.2d 945 (1970) 6
Lucia v. *Duggan*, 303 F.Supp. 112 (D. Mass. 1969) 7
McLaughlin v. *Tilendis*, 398 F.2d 287 (7th Cir., 1968) 7
Pickering v. *Board of Education of Township High-school District 205*, 391 U.S. 563, 88 S.Ct. 731, 20 L.Ed.2d 811 5
Pred v. *Board of Public Instruction*, 415 F.2d 851 (1969) 6
Roth v. *Board of Regents of State Colleges*, 310 F.Supp. 972, 976 (W.D. Wis. 1970) 6
Sindermann v. *Perry*, *supra* 6
Thaw v. *Board of Public Instructions*, 432 F.2d 98 (1970) 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 52

CHARLES R. PERRY, ET AL.,
Petitioners,

vs.

ROBERT P. SINDERMANN, for himself and for all others similarly situated,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent, Robert P. Sindermann, for himself and others similarly situated, prays that a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit be denied because the Judgment is a correct statement of the law of Summary Judgment

procedure, the right to a hearing in the U. S. District Court of a non-tenured teacher in a public educational institution who brings a complaint under the Civil Rights Act of 1871, 42 U.S.C. Sec. 1983, and, the rights of a non-tenured teacher in a public educational institution under the Due Process Clause of the Fourteenth Amendment when his teaching contract is not renewed for reasons which the teacher claims are an infringement on his constitutional rights under the First Amendment.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 430 F.2d 939 (1970) The findings and conclusions of the United States District Court for the Western District of Texas (R. 99-101) are set forth in footnote 7 of the opinion of the Court of Appeals.

QUESTIONS PRESENTED

This case, brought under the Civil Rights Act of 1871, 42 U.S.C. §1983, raises two constitutional issues:

1. Whether a complaint by a nontenured teacher in a public educational institution, alleging that the teacher's contract was not renewed because he exercised First Amendment rights of expression, association and petition, states a claim under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983, upon which relief can be granted.

2. Whether a nontenured teacher's rights of procedural due process under the Fourteenth Amendment are violated when a public educational institution, in refusing to renew the teacher's contract, fails to provide the teacher with notice and the opportunity for a hearing.

STATEMENT

We adopt the Statement of Fact of the NEA as amicus curiae.

REASONS FOR DENYING THE WRIT

Respondent contends that this case is not the proper vehicle for review of the conflict between the circuits on the broad constitutional questions of a nontenured teacher's rights under the First and Fourteenth Amendments of the U. S. Constitution because this cause will have to be remanded to the U. S. District Court for further hearings, regardless of how the conflict between the Circuits is resolved, as the Appellate Court below points out:

> "However, a valid distinction might be drawn between a dismissal on bare bones pleadings as was involved in *Pred*, and a disposition on summary judgment as in the case sub judice. This Court has affirmed the use of summary judgment to dispose of constitutional issues, Hawthorne v. United States, 115 F.2d 805 (5th Cir. 1940), see also Dawkins v. Green, 285 F.Supp. 772 (N.D. Fla. 1968), but this form of disposition is often inappropriate in cases involving issues of far-flung import. *Compare* Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) Part II B; Kennedy v. Silas Mason Co., 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948); and Dispatch, Inc. v. City of Erie, 364 F.2d 539 (3rd Cir. 1966). It was totally inappropriate in the case at bar, where the only affidavits on which summary judgment was based were submitted by the plaintiff and where there was a clear offer to prove facts constituting a constitutional claim. Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940). Summary judgment should be granted only when the truth is clear, where the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. Cole

v. Chevron Chemical Co., 427 F.2d 390 (5th Cir. 1970). While there was no dispute about the facts underlying Sindermann's contract status with Odessa College, the truth of his constitutional position was far from clear. The basic facts, as well as the material inferences to be drawn therefrom, were in total dispute. Summary judgment was improper. We explicitly note that we deal only with procedures and not with the merits. The remand for factual explication is made with no intimation whatsoever as to what outcome such further development should produce." (Pet. App. A, at 8-9)

Respondent alleged in his complaint, among other things:

XIX

"That the Plaintiff was advised on May 19, 1969, by the Defendant, Dr. Jack Rodgers, purporting to act under due authority, that his contract would not be renewed for the year 1969-1970. (Cf. Appendix "F")

XX

"That the Defendants, or their agents, refused to give any reasons to the Plaintiff for their decision to not retain him as a member of Odessa Junior College faculty for the school year 1969-1970, and also that the Defendants did not offer the Plaintiff an impartial hearing into the merits of such decision.

XXI

"That the reason for such decision by the Defendants, or their agents, was to retaliate against the Plaintiff for the Plaintiff's expressions of opinion.

XXII

"That the Defendants' decision not to retain the Plaintiff was not based upon good faith on their part.

XXIII

"That the decision of the Defendants is a denial, a violation, a restraint, and a deprivation of the Plaintiff's rights to free speech under the United States Constitution.

XXIV

"That the decision of the Defendants was not made under ascertainable, and definite standards governing the Defendants in making this decision.

XXV

"That the Defendants, or their agents, have intimidated and harassed the Plaintiff and other Odessa Junior College faculty members similarly because the Plaintiff and those so situated have exercised their right to free speech in a way critical of the Defendants." (R. 87-88)

Given these allegations, the only reason for this case not to be remanded for further hearings on the Complaint would be if this Court were to decide that nontenured teachers (assuming the allegations in Respondent's Complaint to be true) could lose their teaching job for the sole reason that they exercised their First Amendment rights of expression, association and petition. This, however, would require a reversal of *Pickering* v. *Board of Education of Township Highschool District 205*, 391 U.S. 563, 88 S.Ct. 731, 20 L.Ed.2d 811.

The proper vehicle for a review of these broad constitutional issues should be a case where the lower appellate court ruled incorrectly. The Respondent has been in the Federal Courts for well over two years.

ARGUMENT

The Court decisions dealing with the substantive rights of teachers have made clear the extent of the protection afforded by the Constitution. As summarized in the recent decision in *Roth* v. *Board of Regents of State Colleges*, 310 F.Supp. 972, 976 (W.D. Wis. 1970):

> The employment of a teacher in a public school cannot be terminated because he has exercised that freedom secured to him by the Constitution of the United States. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 605, 606, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947), cert. den. 332 U.S. 825, 68 S.Ct. 166, 92 L.Ed. 400. This substantive constitutional protection is unaffected by the presence or absence of tenure under state law. Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. den. 385 U.S. 1003 [87 S.Ct. 706, 17 L.Ed.2d 542]; see McLaughlin v. Tilendis, *supra;* Bomar v. Keyes, *supra;* Lucia v. Duggan, 303 F.Supp. 112, 118 (D.Mass. 1969). Nor is it material whether employment is terminated during a given contract period, or not renewed for a subsequent period. McLaughlin v. Tilendis, *supra.*

Respondent realizes that there is a conflict of opinion between the Fifth Circuit in *Pred* v. *Board of Public Instruction*, 415 F.2d 851 (1969); *Ferguson* v. *Thomas*, 430 F.2d 852 (1970); *Sindermann* v. *Perry, supra; Lucas* v. *Chapman*, 430 F.2d 945 (1970); *Thaw* v. *Board of Public Instructions*, 432 F.2d 98 (1970), and the Tenth Circuit in *Jones* v. *Hopper*, 410 F.2d 1323 (1969). However, the

Fourth Circuit also holds that a nontenured teacher cannot have his contract terminated because of his exercise of his constitutionally protected First Amendment guarantees, *Johnson* v. *Branch*, 364 F.2d 177 (1966), cert. den. 385 U.S. 1003. The First, Second and Seventh Circuits also follow this reasoning: *Lucia* v. *Duggan*, 303 F.Supp. 112 (D. Mass., 1969); *Bomar* v. *Keyes*, 162 F.2d 136 (2d Cir., 1947); and, *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir., 1968). Though one cannot be blinded by partisan advocacy to the fact that the Tenth Circuit disagrees with the Fifth Circuit on the constitutional issues raised in this case, Respondent believes that the lower appeal Court's decision in this case is dispositive and not much more can be added to what they have said. Besides, the Fifth Circuit finds itself in agreement with the First, Second, Fourth and Seventh Circuits.

CONCLUSION

Writ should be denied in this case for the above reasons.

Respectfully submitted,

LAW OFFICES BURNETT & CHILDS
P. O. Box 3707
Odessa, Texas 79760

By: .....
WARREN BURNETT

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Brief Of Respondent was this 2nd day of June, 1971, placed in the United States Mail, postage paid, Certified Mail, Return Receipt Requested, properly addressed to each of the following attorneys:

Mr. W. O. Shafer
P. O. Drawer 1552
Odessa, Texas 79760

Mr. Raymond D. Wier
103 O'Michael Building
Odessa, Texas 79760

Mr. David Rubin
1201—16th Street, N.W.
Washington, D.C. 20036

Mr. Richard J. Medalie
Alvin Friedman
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

WARREN BURNETT

FILE COPY

Supreme Court, U.S.
FILED
AUG 14 1971
E. ROBERT SEAVER, CLERK

NO. 70-36

In the

Supreme Court of the United States

CHARLES R. PERRY, et al.,
Petitioners

vs.

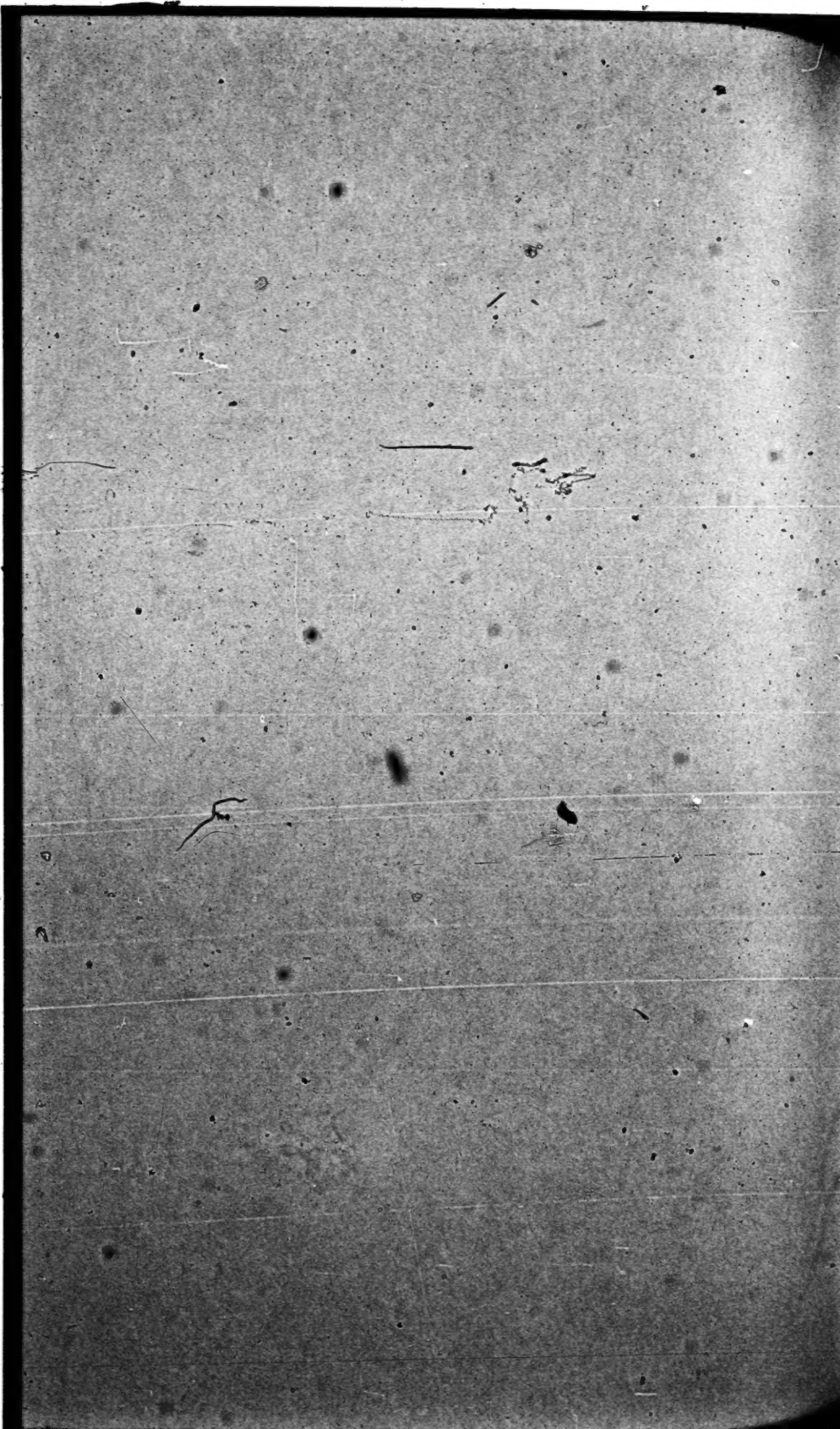
ROBERT P. SINDERMANN,
for himself and for all others similarly situated,
Respondent

BRIEF OF PETITIONERS

W. O. SHAFER
P. O. Drawer 1552
Odessa, Texas 79760
LUCIUS D. BUNTON
P. O. Drawer 1552
Odessa, Texas 79760
RAYMOND D. WIER
103 O'Michael Building
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS,
BUNTON & McCOLLUM
P. O. Drawer 1552
Odessa, Texas 79760
Of Counsel

Attorneys for Petitioners



NO. 70-36

In the

Supreme Court of the United States

CHARLES R. PERRY, et al.,
Petitioners

vs.

ROBERT P. SINDERMANN,
for himself and for all others similarly situated,
Respondent

BRIEF OF PETITIONERS

W. O. SHAFER
P. O. Drawer 1552
Odessa, Texas 79760
LUCIUS D. BUNTON
P. O. Drawer 1552
Odessa, Texas 79760
RAYMOND D. WIER
103 O'Michael Building
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS,
BUNTON & McCOLLUM
P. O. Drawer 1552
Odessa, Texas 79760
Of Counsel

Attorneys for Petitioners

INDEX

	Page
Opinions of the Courts Below	1
Jurisdictional Statement	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	4
Statement	4
Argument	6
Conclusion	23

TABLE OF AUTHORITIES

Cases:	Page
Beilan v. Board of Education of Philadelphia, 357 U.S. 399, 2 L.Ed. 1414, 78 S.Ct. 1317 (1958)	14, 15
Bomar v. Keyes, 162 F.2d 136 (2nd Cir. 1947)	21
Bradford v. School Dist. No. 20, Charleston, South Carolina, 364 F.2d 185 (4th Cir. 1966)	16, 18
Drown v. Portsmouth School District, 435 F.2d 1182, (1st Cir. 1970)	11, 12
Ferrell v. Dallas Independent School District, et al, 392 F.2d 697 (5th Cir. 1968)	19, 20
Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir. 1969) cert. den. 396 U.S. 843	12, 22
Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969) cert. den. 397 U.S. 991, 90 S.Ct. 1111. 25 L.Ed.2d 399 (1970)	4, 8
Parker v. Board of Education of Prince George's County, Maryland, 348 F.2d 464, affirming 237 F. Supp. 22 (D. Md. 1965) cert. den. 382 U.S. 1030 (1966)	18

Constitution and Statutes: **Page**

Constitution of the United States, First Amendment 2

Constitution of the United States, Fourteenth Amendment 2

Texas Constitution, Art. VII, Secs. 1 and 3 ..... 3, 20

28 U.S.C., Sec. 1343 5

28 U.S.C. 1254 (1) 2

42 U.S.C., Secs. 1981 and 1983 ..... 2, 5

Tex. Civ. Stat., Article 2815h, Secs. 13 and 20 ..... 3, 6

Tex. Civ. Stat., Article 2815 3

Pickering v. Board of Education, 391 U.S. 563 (1968) 21, 22

Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969) 21

Shelton v. Tucker, 364 U.S. 479, 81S.Ct. 247 (1960) 22

NO. 70-36

In the

SUPREME COURT OF THE UNITED STATES

CHARLES R. PERRY, et al.,
Petitioners

vs.

ROBERT P. SINDERMANN,
for himself and for all others similarly situated,
Respondent

BRIEF OF PETITIONERS

I.

OPINIONS OF THE COURTS BELOW

The judgment of the United States District for the Western District of Texas, Midland-Odessa Division, is reported at Pages 106-108 of the Appendix. (A. 106)

The Opinion of the Fifth Circuit Court of Appeals is found at pages 185-196 of the Appendix, (A. 185) and the Judgment of that Court is found at Page 197 of the Appendix, (A.197) with the Order Overruling the Petition for Rehearing being found at Page 198 of the Appendix. (A.198).

The case is also reported in 430 F. 2d 939.

II.

JURISDICTIONAL STATEMENT

The Judgment of the Fifth Circuit Court of Appeals was entered on August 10, 1970, and is printed in the Appendix at Page 197. (A.197). Rehearing was denied on September 9, 1970, and that Order is printed in the Appendix at Page 198. (A.198). Jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fourteenth Amendment:

"Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

3. 42 U.S.C., Sec. 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

4. Article VII, Sec. 1, Texas Constitution:

". . . it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

5. Article VII, Sec. 3, Texas Constitution:

". . . and the Legislature may also provide for the formation of school districts by general laws; . . .".

6. Article 2815h, Sec. 13, Texas Civil Statutes:

"The Board of Trustees of the Junior College shall have the power to select a president, dean or other administrative officer, and, upon his recommendation, to select the faculty and other employees of the college, and to fix the compensation and manner of payment of such administrative head, faculty and employees. . .".

7. Article 2815h, Sec. 20, Texas Civil Statutes:

". . . Said Board of Trustees shall adopt such rules, regulations and by-laws as they may deem proper, and they shall have exclusive power to manage and govern said Junior College. . .".

8. Article 2815o, Texas Civil Statutes:

Changed the Board of Trustees to a Board of Regents and increased members from 7 to 9.

IV.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the judgment of the trial court and in remanding the cause for trial, because the pleadings and summary judgment evidence established that petitioners did not deprive respondent of any right, privilege or immunity secured by the Federal Constitution and laws, and the trial court so held.

2. Whether the Court of Appeals erred in reversing the judgment of the trial court because respondent had no constitutionally protected right to have his teaching contract renewed, had no tenure and had no expectancy to continued employment under the constitution and Laws of the State of Texas and because the petitioners, in electing not to renew respondent's contract, validly exercised the discretion conferred and imposed upon them by the Constitution and Laws of the State of Texas.

3. Whether the Court of Appeals erred in refusing to follow **Jones v. Hopper,** 410 F.2d 1323, (10th Cir., 1969 (en banc), cert. denied 397 U.S. 991, 90 S.Ct. 1111, 25 L.Ed.2d 399 (1970).

V.

STATEMENT

This suit was brought in the United States District Court for the Western District of Texas, Midland-Odessa Division, by respondent Sindermann against the petitioners, who were the Board of Regents of Odessa Junior College, the individual members of the Board of Regents and the president of the col-

lege. Respondent based jurisdiction on 42 U.S.C., Sec. 1983 and 28 U.S.C., Sec. 1343, (A. 2).

Respondent alleged, in effect, that he was a teacher at Odessa Junior College for the school year 1968-1969 and that his contract was not renewed for the succeeding year in order to retaliate against him for his exercise of certain rights guaranteed under the First and Fourteenth Amendments to the Constitution. Respondent sought judgment that the decision of the petitioners not to renew his contract was in violation of his rights, that he be given a formal hearing on the reasons his contract was not renewed, that he be retained on the faculty for the succeeding school year, and that he recover $475,000 in actual and punitive damages. All of the petitioners filed motions for summary judgment (A. 78). These were granted by the trial court which found that respondent had no cause of action, had no contract, had no right which would require petitioners to execute a contract with respondent or to employ him and that petitioners did not violate any constitutional rights of respondent (A. 106).

Respondent Sindermann became a member of the faculty of Odessa Junior College in 1965 and by successive one-year contracts remained on the faculty through the 1968-1969 school year. His last one-year contract expired on May 31, 1969, which was the end of the school year. (Plaintiff's First Amended Original Complaint, Par. VI [A. 92]).

Odessa Junior College has no tenure system. No member of the faculty had any formal assurance that their employment would be continued beyond the school year during which they were teaching. This fact was not only known to Mr. Sindermann

at the time he entered into his original contract with the college, but also such fact was affirmatively stated in the **Faculty Guide** which was in use at the time of the commencement of and throughout his employment. (Plaintiff's First Amended Original Complaint, Par. VII [A. 92-93 and A. 15]). The renewal of a teacher's yearly contract is discretionary with the president and the Board of Regents under applicable state law as well. Article 2815h, Sec. 13 and 20, Tex. Civ. Stat., set out **supra.**

At one time Mr. Sindermann was made co-chairman of the Social Science Department with a $300 per year increase in pay. In the fall of 1968, however, he was dropped as co-chairman because of his addiction to writing lengthy letters to other members of his department and his unwillingness to follow certain administrative procedures. His salary was not reduced. (Pgs. 1-2, Appendix A to Plaintiff's First Amended Original Complaint [A. 12]).

In February of 1969 Mr. Sindermann was elected president of the Texas Junior College Teachers Association. Immediately after his election, contrary to the previous actions of other College faculty members who had held this same position, Mr. Sindermann requested a full time secretary, that he be relieved of a portion of his teaching load and that he be given time off from his classes to visit various other Texas junior colleges. These requests were refused. (Pgs. 2-3, Appendix A to Plaintiff's First Amended Original Complaint. [A. 12-13]).

On April 9, 1969, Mr. Sindermann sent a letter to Professor Sedate, Dean of the Evening College and Chairman of the Social Science Department, requesting permission to be absent from his classes

for the purpose of appearing and testifying in Austin, Texas, in connection with certain legislation pending in the Texas legislature. Pursuant to the provisions of the **Faculty Guide,** the letter was referred to the Dean of the College and then to the President. The request was denied by the President and a letter to this effect was sent to Mr. Sindermann on April 10, 1969. (Plaintiff's Appendix "AA", pgs. 4-6 [A. 16-17]).

On the afternoon of April 22, 1969, Mr. Sindermann again requested permission from the President of the college to be absent from his classroom and his teaching duties for the purpose of appearing and testifying at Austin, Texas, in support of certain legislation. This permission was denied by the president of the college, whose decision in such matters is final under the provisions of the **Faculty Guide.** In spite of the refusal, Mr. Sindermann was absent from his classes on April 23, 1969, and went to Austin to testify in connection with the legislation involved. However, no hearing was held in Austin and he did not testify.

Again, under date of April 25, 1969, Mr. Sindermann, by letter, requested permission from the chairman of his department to be absent from his classes on April 28, 1969, for the purpose of once more going to Austin to testify in support of certain legislation. He was again denied permission to be absent from his classroom duties and this refusal was delivered in writing to his home on April 26, 1969. In spite of this refusal by his superiors, Mr. Sindermann, by letter dated April 27, 1969, advised the chairman of his department that he would be absent anyway on April 28, 1969, and he was so absent

from his classes, contrary to the instructions of the administration. (Plaintiff's Appendix "A", pgs. 7 and 8; [A. 19-20]). Respondent affirmatively pleaded in his complaint and it is his position that these absences were "unauthorized" and without "the College Administration's approval". (Plaintiff's First Amended Original Complaint, Par. XII [A. 94]). This was one of the reasons for failing to renew his contract (Plaintiff's Affidavit in support of a Motion Opposing Summary Judgment; [A. 96, § 5.[3]).

Under date of May 19, 1969, the president of Odessa Junior College notified Mr. Sindermann that the Board of Regents had voted not to renew Mr. Sindermann's contract for 1969-1970. (Appendix "F", Plaintiff's Original Complaint [A. 53]). This suit was filed some three days later on May 22, 1969. Until the suit was filed, no request had been made for an administrative hearing. No hearing was held.

Each of the foregoing facts are established without contradiction or dispute by respondent's own pleadings.

VI.
ARGUMENT

Jones v. Hopper, supra, is directly contrary to the opinion of the court below, and was so recognized by the court below. In **Jones,** the complainant was an associate professor of philosophy at Southern Colorado State University. He did not have a tenure privilege. Jones was employed under one-year contracts, and at the end of his second year, the appellees, who were the president and the board of trustees of the college, determined he would not be re-

hired for a third year. Jones then filed suit under the Civil Rights Act claiming that he was not rehired because he had exercised his constitutionally protected rights under the first and fourteenth amendments in (a) objecting to the disqualification of an applicant for his department; (b) attacking an English text book in a student newspaper; (c) founding an independent publication containing articles criticizing the war in Viet Nam, commenting on labor problems and pacifism and objecting to monitored classrooms; and (d) supporting a student in his dispute with the draft board. Jones contended that he had an expectancy of continued employment which was terminated because of the conduct described and that this was an injury to an interest protected by the Civil Rights Act. Jones further contended that the appellees conspired to punish him for exercising his constitutional rights.

The trial court dismissed the complaint for failure to state a claim upon which relief could be granted. This was affirmed on appeal, the Tenth Circuit holding that Jones was not deprived of any rights, privileges or immunities secured by the Federal Constitution and Laws. The appellate court reasoned first, that Jones had no contract interest which was breached since the contract expired and did not exist, and second, that because of broad powers of management and control conferred on the Board of Trustees by Colorado Law, Jones had no expectancy to continued employment.

This decision should be controlling. First, the complaint in the instant case makes no allegation that a contract existed and seeks no recovery for a breach of contract. Second, the powers conferred by Texas Law upon the Board of Regents and President of

Odessa Junior College are no less broad than those of Colorado Law. See Texas statutes cited above. Petitioners are given the power to select the faculty and exclusive power to manage and govern the junior college. The statutory powers given to the Board, the one-year contract and the lack of tenure all, as clearly as in **Jones,** militate against and deny an expectancy to continued employment. Mr. Sindermann was not deprived of any constitutionally protected right or privilege and the trial court was correct in so holding.

The conflict presented by **Jones** and the opinion of the court below is obvious. It must be reconciled for the guidance of our educational institutions.

The summary judgment evidence establishes that the petitioners, in not rehiring Mr. Sindermann, did not exceed their authority nor abuse the discretion imposed by State Law. Surely, petitioners must retain some control over the makeup of the faculty. The issue in not rehiring and the concern of the administration, as shown by the press release attached as "Exhibit A" to Plaintiff's Amended Complaint, (A.12) were not that Mr. Sindermann had spoken out or exercised his right of free speech, but that he had in the past caused some inconvenience in his department with lengthy letters, evaded administrative procedures, made unusual demands of the college with respect to his Texas Junior College Teachers Association position and strongly indicated that position was paramount over the teaching function he was employed to perform. This pattern finally culminated in Mr. Sindermann's disregarding his teaching duties and the instructions of the college administration in order to lobby, at a time of his own choosing, for legislation in which the Associa-

tion was interested despite the fact the Association employed an agent for this very purpose. The petitioners, in the exercise of the discretion expressly granted to them by Texas Law, and subject to election by the voters of the Junior College District, had the right to consider the past attitude and conduct of the respondent in determining the makeup of the college faculty and in determining whether or not the best interests of the college and its educational function would be promoted by refusing to rehire petitioner or any other professor. This discretionary power has been exercised in a reasonable, legitimate manner consistent with all constitutional and statutory rights of Mr. Sindermann.

The First Circuit has aligned itself with the Tenth Circuit. In **Drown v. Portsmouth School District,** 435 F.2d 1182 (1st Cir. 1970), the Court held that a hearing was not required by a non-tenured schoolteacher whose contract had not been renewed. In the **Drown** case, the teacher complained that she was deprived of her rights guaranteed by the Constitution when her standard one-year contract was not renewed and she sought and was denied a list of reasons for the decision not to rehire her, and was also denied a hearing so that she might challenge whatever reasons might have been given. While the **Drown** case does give a rather thorough discussion of the division among the Circuit Courts of Appeal on whether or not teachers have a right to an administrative hearing, it also serves to point out that the Courts have been called on to "balance the competing interests of the individual teacher and of the school board."

In the case at bar, however, no request for a hearing was made by Sindermann until after he filed

suit in the United States District Court. A hearing actually would have served no purpose in this case, either, because Sindermann had already been advised of the reasons for the president not recommending to the Board of Regents that the contract be renewed.

The **Drown** case also is authority for the fact that non-tenured teachers who do not like being hired on an annual basis can either bargain with the school board employer to change the term of the contract, or the teacher can seek employment in institutions where the terms are different.

The **Drown** case, of course, is in direct conflict with the Fifth Circuit because the First Circuit refused to require the school authorities to hold an administrative hearing even if the reasons for the termination were constitutionally impermissible and even if the decision to terminate had been made in bad faith. Justice Coffin, for the First Circuit, also refused to accept the Fifth Circuit's distinction "between non-tenured teachers who have an expectancy of re-employment and those who do not." Rather, the Court, in the **Drown** case, maintained that:

> almost every teacher, arguably, at least, has such an expectancy and we think a teacher has an interest in employment protected by the due process clause independent of the existence of this quasi-contractual right."

Still another case which is authority for reversing the instant case is the case of **Freeman v. The Gould Special School District of Lincoln County, Arkansas,** 405 F.2d 1153 (8th Cir. 1969), Cert. den. 396 U.S. 843. This case involved an internal struggle between the teachers and their principal in the school in Ar-

kansas. In the course of the Opinion, Circuit Judge Gibson held:

> "Absent statutory or contractual requirements, persons discharged for inefficiency, incompetency or insubordination have no constitutional right to a hearing with rights of cross-examination and confrontation of witnesses."

By his own pleadings the Respondent in this case has admitted that one of the reasons the employment contract under which he was working was not renewed was because of insubordination. There are no statutory or contractual requirements in the State of Texas requiring that a hearing be held.

The **Freeman** case goes on to hold: "There must be some degree of harmonious cooperation in school administration to insure an efficient use of public funds and a reasonably satisfactory school program. School boards are representatives of the people and should have wide latitude and discretion in the operation of the school district including employment and re-hiring practices. Local autonomy must be maintained to allow continued democratic control of education as a primary state function subject only to clearly enunciated legal and constitutional restrictions."

The Board of Regents of Odessa College are representatives of the people and they should be given the same wide latitude and discretion in the operation of the school district that the Gould Special School District of Lincoln County, Arkansas, was given.

When the respondent, over a period of months, showed a lack of cooperation with the college administration, an unwillingness to follow administrative procedures, made unreasonable demands and

finally when the respondent wilfully and intentionally disobeyed the administration's directive to teach his classes and not absent himself from the classroom, and by his own pleadings admitted such action, the Board of Regents did not deprive him of any right, privilege or immunity secured by the Federal Constitution and laws. The Board of Regents and the President of the College, because of this conduct, elected not to renew the respondent's contract and such was a valid exercise of the discretion conferred and imposed upon them by the Constitution and Laws of the State of Texas.

An analagous case is **Beilan v. Board of Education of Philadelphia,** 357 U.S. 399, 2 L.Ed. 1414, 78 S.Ct. 1317 (1958). There a teacher refused to tell his immediate supervisor whether or not he had ever been a member of the communist party, and was dismissed on the grounds of incompetency.

Justice Burton, in his opinion for a majority of the Supreme Court, said:

> "The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory incompetency 'based on his refusal to answer the superintendent's questions.' "
>
> * * * * *
>
> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher."
>
> * * * * *

"It (the Board) took care to charge petitioner with incompetency, and not with disloyalty. It found him **insubordinate** and lacking in frankness and candor—it made no finding as to his loyalty."

* * * * *

"In the instant case, the Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's '**deliberate** and **insubordinate** refusal to answer the questions of his administrative superior in a vitally important matter pertaning to his fitness.' 386 Pa. at 91, 125 A.2d, at 331. This interpretation is not inconsistent with the Federal Constitution." (Emphasis added.)

Paraphrasing Justice Burton, we might say that Professor Sindermann, by engaging in teaching at Odessa Junior College, did not give up his right to speak out. He did, however, undertake obligations of candor, discipline and cooperation and his failure to live up to those obligations resulted in the refusal of the Board of Regents to reinstate him.

Respondent's pleadings admit that Odessa Junior College has no tenure system, and that an employee of the college can expect to be employed only so long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors. The **Beilan** case found, as a matter of law, that simply refusing to answer questions of an administrative superior was deliberate insubordination amounting to incompetency and that discharge on this basis was not violative of any of petitioner's rights under the Constitution of the United States (and this, in a tenure state). Certainly, in the instant case, Sindermann's deliberate course

of conduct brings him within the framework of **Beilan.**

In **Bradford v. School District No. 20, Charleston, South Carolina,** 364 F.2d 185 (4th Cir. 1966), the appellant, a teacher in a high school in Charleston, brought a suit in the federal district court, claiming that the School Board violated his due process rights because he was dismissed from his position without notice or opportunity to be heard. Although Bradford based his action on Sections 1981 and 1983 of Title 42, U.S.C., the suit was dismissed with prejudice.

Bradford alleged that he went to a barbershop, was refused service, and was thereafter arrested for being drunk, disorderly and assaulting an officer. He was tried in Corporation Court, found guilty and appealed his conviction to the county court, where it was still pending. He pleaded he was dismissed from his teaching job because of his alleged misconduct. The trial judge held that the petition failed to state a cause of action. The appellate court stated that the district court had properly treated the motion to dismiss as a motion for summary judgment under Rules 12 (b) and (c), and that the motion was supported by allegations in the complaint which showed a valid ground for the school board's action of dismissal.

Circuit Judge Bell stated:

"We think too the court was justified in rejecting the plaintiff's contention that his right to equal protection of the laws was violated by the action of the school Trustees. That the Trustees had the statutory duty and responsibility of supervising the conduct of teachers and of dismissing them in proper cases is conceded. **Adler v. Board of Ed-**

ucation, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952); **Garner v. Board of Public Works of City of Los Angeles,** 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1951). In **Adler** the Court said:

> "That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.'

"The Supreme Court has also declared that fitness for teaching depends on a broad range of factors, and that there is no requirement in the Federal Constitution that classroom conduct must be the sole basis for fitness. **Beilan v. Board of Education,** 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed. 2d 1414 (1968). It is, of course, true that the Board's discretion may not be exercised in an arbitrary and capricious manner, nor may the Board exercise its discretion in a discrimnatory manner. **Johnson v. Branch,** 364 F. 2d 177 (4th Cr. 1966); **Franklin v. County School Board of Giles County,** 360 F.2d 325 (4th Cir. 1966), and cases cited therein. Given the plaintiff's admission that he had been convicted by the Municipal Court of public drunkenness and assaulting an officer and that his suspension was 'by reason of his alleged misconduct', his failure to allege or contend that the defendants had in any way colluded or conspired in that conviction or had any knowledge of any impropriety therein, we think the court had before it objective facts shown on the face of the complaint which support the discretionary action of the Board and which combined with his failure to notify the Board of any defense, constituted an insuperable

bar to relief. Cf. **Leggett v. Montgomery Ward & & Co.,** 178 F.2d 436 (10 cir. 1949); **Bach v. Quiran,** 5 F.R.D. 34 (D.C.N.Y. 1945).

"We think these facts left no genuine issue of fact to be decided and even giving the plaintiff the benefit of all reasonable doubt, see Wright, **Federal Courts,** Pg. 387 (1963), the defendants were entitled to the summary judgment which the court granted."

Sindermann, as in **Bradford,** has "given this court his "admission" that he was uncooperative with the administration and wilfully disobedient. The admission leaves "no genuine issue of fact to be decided, and even giving Mr. Sindermann the benefit of all reasonable doubt", petitioners were entitled to their summary judgment. A contrary conclusion would require them to violate their duty under law, and invite the other 100 faculty members to disregard all administrative policy and authority.

The Fourth Circuit, in 1965, dealt with a non-tenured teacher and in the case of **Parker v. Board of Education of Prince George's County, Maryland,** 348 F.2d 464, (4th Cir. 1965), affirming 237 F. Supp. 222 (D. Md. 1965), cert: den. 382 U.S. 1030 (1966), upheld a summary judgment though Parker was complaining that his 5th, 14th and 1st Amendment rights had been abridged. Nevertheless, in the per curiam opinion the decision was that on the basis of the contract alone the teacher failed to state a cause of action for re-instatement or damages. The situation in the instant case is identical except here we have a teacher who, by his own admission, violated the directives of the administration.

The Civil Rights Statutes and the proper administration of public schools must be viewed in proper context. In **Ferrell v. Dallas Independent School District, et al,** 392 F.2d 697 (5th Cir. 1968), the school principal refused to enroll male students because they failed to comply with a school regulation banning long hair. The Fifth Circuit affirmed the district court, which had concluded that the school authorities had not acted arbitrarily, capriciously or unreasonably in refusing to admit the students.

Judge Gewin wrote:

"This case brings into focus a sensitive area of the law. Constitutional issues which arise under the Bill of Rights have been before the courts many times. The decided cases clearly demonstrate that each case must be decided in its own particular setting and factual background and within the context of the entire record before the court in determining whether the rule or the action about which complaint is made is arbitrary, capricious, unreasonable or discriminatory. This approach to the problem is clearly demonstrated by the authorities hereinafter cited as well as the following: **Thornhill v. State of Alabama,** 310 U.S. 88, 101, 60 S.Ct. 736, 84 L.Ed. 1093, 1102; **West Virginia State Board of Education v. Barnette,** 319 U.S. 624, 627, 63 S.Ct. 1178, 87 L.Ed. 1628, 1637; **Dennis v. United States,** 341 U.S. 494, 510, 71 S.Ct. 857, 868, 95 L.Ed. 1137, 1153; **Whitney v. People of the State of California,** 274 U.S. 357, 376, 47 S.Ct. 641, 71 L.Ed. 1095, 1106. In **Dennis v. United States,** supra, the Supreme Court approved, as a general rule, the following statement by Chief Judge Learned Hand.

> 'In each case (courts) must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'

"The Constitution does not establish an absolute right to free expression of ideas, though some might disagree. The constitutional right to free exercise of speech, press, assembly, and religion may be infringed by the state if there are compelling reasons to do so.

"The compelling reason for the State infringement with which we deal is obvious. The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the best education possible for its people must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right."

Just as in the **Ferrell** case, the Board of Regents was and is compelled by the Constitution of the State of Texas, Article 7, §1, and the statutes of Texas, to adopt regulations for an efficient and effective system and to manage and govern the school consistent with such laws and Constitution. It has done nothing inconsistent with these state requirements nor to unconstitutionally infringe on Sindermann's rights in refusing to renew his contract. The Board has properly exercised its discretionary powers.

Contrary to what the opinion of the lower court seems to recognize, respondent has no absolute right to absent himself from and neglect his school classes

for the purpose of attending a committee hearing at a location over 300 miles away, particularly when the proposed legislation which allegedly prompted the absence was not brought before the legislative committee. The import of the opinion is contrary to **Bomar v. Keyes,** 162 F.2d 136 (2d Cir. 1947), where the court stated at Pg. 139:

> "We do not mean to suggest that a teacher may absent herself from work indefinitely and serve on a jury without regard to her duty; i.e., that she may choose her own time or stay away as long as she pleases."

If there exists valid reasons for refusing to rehire Mr. Sindermann, i.e., his past attitude and conduct, then the parallel existence of invalid reasons, such as newspaper criticism of the administration, would not render nugatory the valid reasons—notwithstanding Sindermann's claim that the invalid reason was the **sole** cause of not being rehired. The valid reasons for not rehiring Mr. Sindermann cannot be erased by his own acts in other activities. If so, the most guilty could profit by simply engaging in offensive (but constitutionally guaranteed rights) and claiming the latter provoked the difficulty, and the former is thereby rendered immaterial.

It must be remembered that we are dealing here with a disciplinary problem. No doubt, the respondent will rely on the case of **Pickering v. Board of Education,** 391 U.S. 563 (1968), and **Pred v. Board of Public Instruction,** 415 F.2d 851 (5th Cir. 1969), but the opinions in both of those cases recognized that discipline is of high priority in the operation

of any school or question. As a matter of fact, the Supreme Court, in the **Pickering** case, said this:

> "Thus no questions of maintaining either discipline by **immediate superiors** (emphasis ours) or harmony among co-workers is presented here."

The President and Board of Regents were acting within the law, and did not violate respondent's constitutional rights when they refused to renew the employment contract. The question in the case at bar is one of maintaining discipline. Where the respondent admittedly, on not one but two separate occasions, flaunted the express instructions of the administration, he is not entitled to relief.

As Circuit Judge Gibson wrote in the **Freeman** case, supra:

> "We do not think it within the province of the federal court to pass upon and decide the merits of all the internal operative decisions of a school district."

This Honorable Court held in **Shelton v. Tucker,** 364 U.S. 479, 487, 81 S.Ct. 247, 251 (1960):

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. **** Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Respondent, through his past actions, has made himself patently unacceptable to the administration

of an orderly, effective college system. The petitioners concluded, in the exercise of a reasonable and sensible judgment, that it would not be in the best interest of the college to make a new contract with Mr. Sindermann. This action was based on adequate and sufficient, even compelling reasons, and should be affirmed by this court.

CONCLUSION

This Honorable Court should render judgment reversing the judgment of the Fifth Circuit Court of Appeals and affirming the judgment of the Trial Court.

Respectfully submitted,

W. O. SHAFER
P. O. Drawer 1552
Odessa, Texas 79760

LUCIUS D. BUNTON
P. O. Drawer 1552
Odessa, Texas 79760

RAYMOND D. WIER
103 O'Michael Building
Odessa, Texas 79760

SHAFER, GILLILAND, DAVIS
BUNTON & McCOLLUM
P. O. Drawer 1552
Odessa, Texas 79760

Of Counsel

August 1971. Attorneys for Petitioners.

No. 70-36

FILED
SEP 27 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

CHARLES R. PERRY, et al.,
Petitioners,

vs.

ROBERT P. SINDERMANN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

MICHAEL H. GOTTESMAN
GEORGE H. COHEN
DENNIS D. CLARK
BREDHOFF, BARR, GOTTESMAN, COHEN & PEER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
WARREN BURNETT
RICHARD J. CLARKSON
BURNETT & CHILDS
P.O. Box 3707
Odessa, Texas 79760
Attorneys for Respondent

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE QUESTIONS PRESENTED	1
COUNTER-STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	12
ARGUMENT	17
I. A PUBLIC COLLEGE MAY NOT DENY RENEWED EMPLOYMENT TO A TEACHER BECAUSE HE HAS EXERCISED HIS FIRST AMENDMENT RIGHTS	17
II. THE COURT BELOW CORRECTLY HELD THAT FACTUAL DISPUTES PRECLUDED GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS	20
III. SINDERMANN WAS ENTITLED TO NOTICE AND HEARING PRIOR TO THE DECISION NOT TO RENEW HIM	27
A. Where, as Here, Non-Renewal Is Contemplated for Reasons Which Implicate the First Amendment, the Decision Must be Preceded by Notice and Hearing	29
B. Teachers in Public Educational Systems Are Entitled to Notice and Hearing Prior to a Decision That They Will Not Be Renewed, Irrespective of the Reason for Non-Renewal	33
(1) The Teacher's Interest in Retention of His Job	35
(2) The Teacher's Right Not To Be Arbitrarily Terminated	36
(3) Injury to Reputation and Inability to Pursue the Teaching Profession	37
(4) Preserving Academic Freedom	37
C. In the Usual Case (as Here) There Are no Overriding Governmental Interests Precluding Notice and a Hearing	43
D. A Teacher Who Is Non-Renewed Without Notice and Hearing Is Entitled to Automatic Reinstatement and Back Pay, Without Consideration of Whether the Dismissal Was Substantively Justified	46
IV. THE FEDERAL COURTS HAVE JURISDICTION OVER THIS ACTION	50
CONCLUSION	52

TABLE OF CITATIONS

Cases

Page

Adler *v.* Board of Education, 342 U.S. 485 (1952) 38

Armstrong *v.* Manzo, 380 U.S. 545 (1965) 16, 32, 33, 46

Auerbach *v.* Trustees of the Calif. State Colleges, Civ. Ac. No. 71-1126-F (C.D. Calif., August 18, 1971) 40

Bantam Books *v.* Sullivan, 372 U.S. 58 (1963) 29

Bell *v.* Burson, 402 U.S. 535 (1971) 15, 32, 34, 38, 44

Betts Baking Co. *v.* NLRB, 380 F.2d 199 (10th Cir. 1967) 24

Birnbaum *v.* Trussell, 371 F.2d 672 (2d Cir. 1966) 38

Boddie *v.* Connecticut, 401 U.S. 371 (1971) 14, 32

Bomar *v.* Keyes, 162 F.2d 136 (2d Cir. 1947), cert. denied 332 U.S. 825 (1947) 13, 26

Blount *v.* Rizzi, 400 U.S. 410 (1971) 29

Cafeteria Workers *v.* McElory, 367 U.S. 886 (1961) 34

Canty *v.* Board of Education, No. 71-1312 (2d Cir., Sept. 3, 1971) 51

Chase *v.* Fall Mountain Regional School Dist., Civ. Ac. No. 3112 (D.N.H., July 28, 1971) 22, 37, 39

Connell *v.* Higginbotham, 403 U.S. 207 (1971) 15, 34

Drown *v.* Portsmouth School District, 435 F.2d 1182 (1st Cir. 1970) cert. denied 39 L.W. 3511 (May 18, 1971) 38, 41

Eisen *v.* Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970) 51, 52

Epperson *v.* Arkansas, 393 U.S. 97 (1968) 17

Ferguson *v.* Thomas, 430 F.2d 852 (5th Cir. 1970) 12, 20, 29

Fibreboard Corp. *v.* Labor Board, 379 U.S. 203 (1964) 22

Fluker *v.* Alabama State Board of Education, No. 30670 (5th Cir., March 31, 1971) 22, 24-25, 25

Frost *v.* Railroad Commission, 271 U.S. 583 (1926) 18

George *v.* Conneaut Board of Educ., Civ. Ac. No. C 70-398 (N.D. Ohio, Aug. 20, 1971) 50

Goldberg *v.* Kelly, 397 U.S. 254 (1970) 15, 32, 33, 34, 35, 43, 45, 46

Greene *v.* Howard University, 412 F.2d 1128 (D.C. Cir. 1969) 16, 49

Greene *v.* McElroy, 360 U.S. 474 (1959) 33

Page

Greene *v.* U.S., 376 U.S. 149 (1964) 16, 47

J. P. Stevens & Co. *v.* NLRB, 380 F.2d 292 (2d Cir. 1967), cert. denied 389 U.S. 1005 (1967) 22, 25

Johnson *v.* Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied 385 U.S. 1003 (1967) 20, 22

Jones *v.* Hopper, 410 F.2d 1323 (1969), cert. denied 397 U.S. 991 20

Keyishian *v.* Board of Regents, 385 U.S. 589 (1967) 13, 18, 19, 20, 23, 38, 42, 43

Konigsberg *v.* State Bar, 353 U.S. 252 (1957) 38

Lucia *v.* Duggan, 303 F.Supp. 112 (D. Mass. 1969) 40, 49

Lynch *v.* Household Finance Corp., 318 F.Supp. 1111 (D. Conn.) (Three-judge court), probable jurisdiction noted 39 L.W. 3375 (March 1, 1971) 51

McLaughlin *v.* Tilendis, 398 F.2d 287 (7th Cir. 1968) 20

Montgomery *v.* White, 320 F.Supp. 303 (E.D. Tex. 1969) 25

Mullane *v.* Central Hanover Tr. Co., 339 U.S. 306 (1950) 32

Munro *v.* Board of Education of Elk Rapids Schools, 383 Mich. 661 (Mich. Sup. Ct. 1970) (dissenting opinion of T. G. Kavanagh, J) adopted as the majority opinion of the Court upon reconsideration (No. 52, 508, decided June 18, 1971) 39

Nash *v.* Florida Industrial Commission, 389 U.S. 235 (1967) 31

NLRB *v.* Buitoni Foods Corp., 298 F.2d 169 (3rd Cir. 1962) 24, 25

NLRB *v.* Great Eastern Color Lithographic Corp., 309 F.2d 352 (2d Cir. 1962) cert. denied, 373 U.S. 950 (1963) 25, 26

NLRB *v.* Hanes Hosiery Division, 413 F.2d 457 (4th Cir. 1969) 25

NLRB *v.* Jamestown Sterling Corp., 211 F.2d 725 (2d Cir. 1954) 25

NLRB *v.* L. E. Farrell, 360 F.2d 205 (2d Cir. 1966) 25

NLRB *v.* Murray Ohio Manufacturing Co., 326 F.2d 509 (6th Cir. 1964) 22

NLRB *v.* Park Edge Sheridan Meats, Inc., 341 F.2d 725 (2d Cir. 1965) 24

NLRB *v.* West Side Carpet Cleaning Co., 329 F.2d 758 (6th Cir. 1964) 25

Ohio Bell Telephone Co. *v.* Public Utilities Commission of Ohio, 301 U.S. 292 (1936) 44

Olson *v.* Regents of University of Minnesota, 301 F.Supp. 1355 (D. Minn. 1969) 49

Page

Orr *v.* Trinter, No. 20721 (6th Cir. June 16, 1971), petition for certiorari pending, No. 71-249 45

Patrone *v.* Howland Local Schools Board of Educ., Civ. Ac. No. C 70-819 (N.D. Ohio, Aug. 20, 1971) 50

Petrullo *v.* McCain, Civ. Ac. No. T-4850 (D.Kan. July 7, 1971) . 40

Pickering *v.* Board of Education, 391 U.S. 563 (1968) 13, 14, 18, 19, 20, 21, 26, 30, 46

Pred *v.* Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969) . 20

Ricucci *v.* U.S. 425 F.2d 1252 (Ct. Claims 1970) 35

Roth *v.* Board of Regents, 310 F.Supp. 972 (W.D. Wisc. 1970) 25, 40

Roth *v.* Board of Regents, No. 18490 (7th Cir., July 1, 1971) ... 20, 38, 40, 43

Schware *v.* Board of Bar Examiners, 353 U.S. 232 (1957) 34, 36, 38

Shelton *v.* Tucker, 364 U.S. 479 (1960) 12, 18, 19, 20, 52

Shirck *v.* Thomas, No. 18790 (7th Cir. Sept. 2, 1971) 38

Silver *v.* New York Stock Exchange, 373 U.S. 341 (1963) 16, 48

Singer Company *v.* NLRB, 371 F.2d 623 (8th Cir. 1967) 22

Slochower *v.* Board of Education, 350 U.S. 551 (1956) . 18, 34, 36

Sniadach *v.* Family Finance Corp., 395 U.S. 337 (1969) ... 32, 35

Speiser *v.* Randall, 357 U.S. 513 (1958) .. 14, 18, 29, 30, 32, 33, 34

Tenney *v.* Brandhove, 341 U.S. 367 (1951) 52

Thompson *v.* City of Louisville, 362 U.S. 199 (1960) 36

Tichon *v.* Harder, 438 F.2d 1396 (2d Cir. 1971) 51, 52

Tinker *v.* De Moines School Dist., 393 U.S. 503 (1969) 52

U.S. *v.* Lovett, 328 U.S. 303 (1946) 35

U.S. ex rel. Vajtauer *v.* Comm. of Immigration, 273 U.S. 103 (1927) 36

Vitarelli *v.* Seaton, 359 U.S. 535 (1959) 16, 34, 46

Wieman *v.* Updegraff, 344 U.S. 183 (1952) 18, 36, 42, 52

Winchester Spinning Corp. *v.* NLRB, 402 F.2d 299 (4th Cir. 1968) 25

Wisconsin *v.* Constantineau, 400 U.S. 433 (1971) ... 17, 33, 38, 51

Statutes

	Page
28 U.S.C. § 1331	51
28 U.S.C. § 1343	9, 17, 50, 51
29 U.S.C. § 158(a)(3)	22
29 U.S.C. § 160(c)	22
42 U.S.C. § 1983	9, 17, 26, 31, 49, 50, 51
Alaska Stat., tit. 14, ch. 20, § 180 (1966)	44
Ark. Stat. Ann. § 80-1304(b) (Supp. 1969)	44
Calif. Educ. Code § 13443 (West 1969)	44
Conn. Gen. Stat. Ann. § 5-242 (Supp. 1969)	44
Iowa Code Ann. § 279.13 (Supp. 1971)	44
N.Dak. Code § 15-47-38 (Supp. 1969)	44
Ohio Revised Code, § 3319.16	45
R.I. Gen. Laws Ann. § 16-13-4 (1956)	44
Texas Code Ann. § 21-204 (1969)	44
Wash. Rev. Code Ann. § 28.67.070 (1964)	44

Miscellaneous

Dietert *v.* Board of Education of Talbot County (Md. St. Bd. of Educ. May 26, 1971) 44

Domenicone *v.* School Committee, R.I. Commissioner of Education, May 20, 1970 39

Statement of Robert Hampton, *Washington Evening Star,* April 12, 1971, p. A-8 39

Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 Duke L.J. 841 (1970) 18-19

Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968) 34, 43

No. 70-36

IN THE

Supreme Court of the United States

CHARLES R. PERRY, et al.,

Petitioners,

vs.

ROBERT P. SINDERMANN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. If a teacher in a public college has neither tenure nor a contractual right to reemployment, may the college refuse to renew his employment because he has exercised his First Amendment rights?

2. Whether the court below correctly ruled that summary judgment was improper because there was a factual dispute as to the College's motivation in not renewing the teacher's employment?

3. Where a public college is considering non-renewal of a teacher for reasons which implicate First Amendment rights, is it obliged to provide the teacher with notice and a hearing prior to the decision not to renew?

4. Where a public college is considering non-renewal of a teacher, is it obliged, irrespective of the reasons therefor, to provide the teacher with notice and a hearing prior to the decision not to renew?

5. If a public college denies renewal to a teacher without providing him the procedural due process to which he is constitutionally entitled, is the teacher entitled to reinstatement and back pay without regard to whether valid substantive grounds existed for non-renewal?

While no jurisdictional issue has ever been raised below, this Court has a closely related jurisdictional question before it in *Lynch* v. *Household Finance Corporation,* No. 70-6356, probable jurisdiction noted, 39 L.W. 3375 (March 1, 1971). Because of this, we shall briefly discuss (*infra.* pp. 50-52) the question whether federal courts have jurisdiction over an action in which a public college teacher alleges that his constitutional rights have been violated in that, without a pre-termination hearing, he has been denied re-employment because of the exercise of First Amendment rights.

COUNTER-STATEMENT OF THE CASE

Respondent, Robert P. Sindermann (hereinafter "Sindermann") is a college teacher of Government and Social Science. In May, 1969, he was completing his tenth year of teaching in public colleges in the State of Texas — two at the University of Texas, four at San Antonio Junior College, and four at respondent Odessa Junior College (hereinafter "the College"). On May 19, 1969, Sindermann was advised that his employment would not be renewed for the following school year (A. 53). No claim

was made that Sindermann was not a good teacher — indeed his colleagues in the College's Social Science Department have attested to his competence (A. 52). Rather, Sindermann's non-renewal resulted exclusively from his activities outside the classroom.

During the academic year 1968-69, Sindermann was active in two causes. One was an effort to obtain tenure protection for teachers in public colleges in Texas. The other was an effort to obtain elevation of the College from the status of a two-year junior college to a four-year college. On both issues, Sindermann's position was contrary to that of the Board of Regents of the College (A. 13-15).

In February, 1969, Sindermann was elected President of the Texas Junior College Teachers Association (hereinafter "the TJCTA"), an organization of teachers employed by Texas' 42 public junior colleges. Teacher tenure was one of TJCTA's major goals (A. 12, 86).

At about the same time, Sindermann became a member of "The Committee to Elevate Odessa College," a citizens' organization advocating elevation of the College to four year status (A. 14).

The Texas Legislature, which meets biennially, was in session from January 14 through June 2, 1969. During this session, legislation was introduced on both issues in which Sindermann was interested. In the Texas Senate, these bills were S.B. 512 (according tenure to teachers in public colleges) and S.B. 531 (establishing a four-year college in the Permian Basin). Throughout this period, Sinderman campaigned actively, on his own time, in support of both bills (A. 13-15, 20).

In early April, 1969, Sindermann received a letter from Delton Goodin, Legislative Committee Chairman of the TJCTA, advising that a hearing would be held in Austin on the tenure bill (S.B. 512) on April 23. Goodin's letter stated:

> "It is imperative that you as T.J.C.T.A. President and member of the Legislative Committee attend this hearing. The president of T.A.C.T. and A.A.U.P. will represent their organizations at the Tenure Bill hearing, so T.J.C.T.A. should exhibit equal interest."[1]

Sindermann also received letters from two members of the Senate Committee which was to conduct the hearing, inviting him to testify (A. 50, 51). Austin is several hundred miles from Odessa, and the only way Sindermann could testify was to be absent from the College on the day of the hearing. Accordingly, Sindermann addressed a letter to the Chairman of his Department enclosing a copy of Goodin's letter and requesting permission to be absent on April 23 (A. 16).

Sindermann's request was referred to the Dean of the College, and then to the President of the College, who denied it. The President gave four reasons for denying the request:

> 1. Sindermann was employed as a full-time teacher, and "can make his contribution to Odessa College only by being present to teach";
>
> 2. The TJCTA has a full-time Legislative Committee Chairman — Goodin — "and it is this person who should have represented the organization if it was to be represented. The President of an organization can not perform all the duties of his officers, and he should not attempt to do so";
>
> 3. The TJCTA had not formally endorsed S.B. 512;[2] and

---

[1] Although this letter was attached as an exhibit to a document which was a part of the record below (A. 15-16), it was not printed by Petitioners in the Appendix. Accordingly, we have reprinted it in the Appendix to this brief (*infra*, p 1a).

[2] In an affidavit below, Sindermann stated that the bill *was* sponsored by TJCTA (A. 86).

4. The College had demonstrated "an interest . . . in faculty 'rights'," and indeed was planning to consider adopting a "statement on tenure" in the upcoming academic year (A. 16-17).

Despite the refusal of his request, Sindermann notified the Dean of the College that he would be absent on April 23 to testify on the tenure bill. He arranged for other members of the College's Social Science Department to teach his classes on that day, and they did so (A. 19). Sindermann was guided by the Faculty Guide, promulgated by the College Administration, which he understood to mean that permission was required to qualify for payment for an absence, but that absence without permission was tolerated, albeit not compensable (A. 87).[3]

When Sindermann arrived in Austin on April 23 he learned that the hearings on S.B. 512 had been postponed to April 28. On that date, hearings were also to be held on S.B. 531 (the bill to establish a four year College). Sindermann had been invited by State Senators to testify on the latter bill as well. Accordingly, on April 25, following his return to the College, Sindermann addressed another letter to his Department Chairman, requesting permission

---

[3] Faculty Absences:

"Arrangements for absence *with full pay* shall be made in advance by the employee. Approval for absence because of personal or family illness shall be granted by the departmental chairman and the Dean of the College. Approval of absence for other causes shall be obtained from the Dean of the College and subject to final approval by the President. *The employee shall have 1/180 of his annual salary deducted for each day of such absence not approved by the departmental chairman, the Dean of the College or the President.*" (Emphasis added.) (Faculty Guide at pp. 52-53.)

The Faculty Guide was an appendix to the complaint, but was not printed by Petitioners in the Appendix to this Court.

to be absent on April 28.[4] He stated that other members of the Department were available and willing to teach his classes on that day, and that he was prepared to pay them himself for substituting for him. Noting that one of the grounds for the President's prior refusal was that testimony should be delivered by the Legislative Committee Chairman of the TJCTA (Goodin), he pointed out that Goodin "will be unavailable to testify on Monday, April 28, owing to the necessity to take his three children . . . for tonsillectomies. If I do not testify no one from our organization will, and it is *our* bill."

This letter was referred to the Dean of the College and the President of the College, who refused Sindermann's request. Sindermann notified his Department Chairman that he would nonetheless be absent to testify on April 28, and he was (A. 19-20).[5]

On May 6, Sindermann distributed a mimeographed letter reporting that S.B. 512 (the tenure bill) had been "put in deep freeze" by the Senate Committee, and urging the members of the College faculty to write and wire legislators to help "jar it out of Committee" (A. 20).

On that same day, May 6, the Board of Regents, meeting in Executive Session, was informed of the entire course of Sindermann's above-described activities during the academic year and "expressed disapproval of Mr. Sindermann's actions" (A. 20). At that same meeting, the Board

---

[4] This letter, too, was an attachment to a document in evidence below (A. 19), but was not printed by Petitioners in the Appendix. Accordingly, we have reprinted it in the Appendix to this brief (*infra*, pp. 2-7a.)

[5] The opinion of the court below recites that on "at least four occasions" Sindermann was absent to testify (A. 188). The record reflects only two absences, on April 23 and April 28, and a request for permission to be absent on a third day — May 19 — which fell after the decision not to renew his employment. The record does not reflect whether Sindermann in fact was absent on May 19 (A. 21-22).

determined not to renew Sindermann's employment for the coming school year.[6]

On May 19, Sindermann received a letter from the President of the College (A. 53), stating:

> "The Board of Regents on May 6, 1969, voted to approve my recommendation not to renew your contract for 1969-70. You have been supplied with a statement, with attachments, indicating the basis for this recommendation."

The "statement, with attachments" was a press release which had been issued by the President a few days earlier (A. 12-23). The press release began by reporting that after Sindermann had been hired by the College he had been named Co-Chairman of the Social Sciences Department (A. 12), but that he had been removed as Co-Chairman in the fall of 1968 because, *inter alia*, he had an "addiction" to writing "lengthy letters" to the members of his department (A. 12). It then described Sindermann's election as President of the TJCTA (A. 13), and his aligning himself with the Committee to Elevate Odessa College "in contradiction to a policy statement of the Board of Regents in the matter" (A. 14). As to the latter, the press release declared:

> "Unfortunately, Odessa College has been the object of 'politics' in recent months through the efforts of various people to secure the elevation of Odessa College to four year status." (A. 13).

Sindermann's efforts, on his own time, to advance the tenure and college elevation causes, were recounted in the press release in some detail (A. 14, 15, 20). In addition, the press release also charged that (A. 15):

---

[6] While a press release (A. 12-23) issued a few days later indicates otherwise, the nonrenewal letter (printed in the text below) he received on May 19 made it clear that the Board made the nonrenewal decision on May 6.

> "In the heat of the dissension on the elevation of Odessa College . . . a rather disgusting ad was run, to which Mr. Sindermann's name was attached, in the local newspaper. This ad ridiculed the position taken by the Board of Regents of Odessa College . . .
>
> "While Mr. Sindermann submitted a letter of 'disclaimer' to the President of the Board of Regents, his 'guilt by association' cannot be refuted, because he had acted with this group, opposed to a stated position of the Board of Regents."[7]

The release then described Sindermann's requests to absent himself, the refusals of those requests, and his two absences (A. 16-20). After referring to Sindermann's May 6 letter urging the faculty to wire or write their legislators to "jar" S.B. 512 "out of Committee," the press release recited that on May 6 the Board of Regents "was given the information above" and "expressed disapproval of Mr. Sindermann's actions" (A. 20).

At no time had Sindermann been offered or accorded a hearing on his non-renewal (A. 87). On May 21, 1969, two days after receiving the notice of non-renewal, he wrote to the College President requesting a formal statement of the reasons and a hearing.[8] No response to this request was ever forthcoming.

On May 23, Sinderman filed the complaint in the instant action, naming the Board of Regents, its members, and the

---

[7] The ad, although an exhibit to the press release (A. 15), was not printed by Petitioners in the Appendix. Accordingly, we have reproduced the ad in the Appendix to this brief (*infra*, pp. 16-17a). As is apparent from reading the ad, it was neither "disgusting" nor aimed at the Board of Regents.

[8] Although not a part of the record in the district court, this letter is discussed in the Court of Appeals' decision (A. 195), and we have printed it in the Appendix to this brief (*infra*, p. 8a.)

College President as defendants. Jurisdiction was predicated upon 28 U.S.C. § 1343 and 42 U.S.C. § 1983 (A. 2). The complaint alleged that Sindermann was denied renewal because he had publicly advocated positions contrary to the views of the College administration, thereby contravening his rights under the First and Fourteenth Amendments (A. 7-8, 9). It further alleged that Sinderman, afforded neither notice nor a hearing prior to the Board's decision not to renew him, had been denied procedural due process, in violation of the Fourteenth Amendment (A. 10-11). The complaint alleged that defendants' actions not only deprived Sindermann of employment by the College, but also damaged his reputation and his ability to obtain employment in other colleges in the State of Texas, and would chill the exercise of First Amendment rights by other teachers at the College (A. 8).

The defendants moved for summary judgment (A. 78-85). They filed no affidavits or exhibits in support of their motion, relying exclusively upon the materials which had been attached to the complaint (including, *inter alia*, the press release explaining the reasons for dismissal). The motion advanced two reasons why defendants were entitled to prevail:

> 1. As Sindermann admitted he had neither tenure nor a contractural right to employment for the following year, his non-renewal could not give rise to a justiciable claim; and
>
> 2. In any event, Sindermann admitted that he had absented himself without permission, these absences furnished just cause for the non-renewal, and — there being no factual dispute about the occurrence of the absences — there was no reason for the College to furnish Sindermann a hearing.

The district court granted the motion for summary judgment. Its reasons, in their entirety, were as follows (A. 106-107):

I

Plaintiff's tenure of employment ended May 31, 1969.

II

Odessa Junior College has no tenure system which fact was known to the Plaintiff at the time he entered into his original contract with the College.

III

After the termination of his contract of employment the Defendant College owed no obligation to the Plaintiff.

I conclude:

I

Plaintiff has no cause of action against the Defendants since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system.

II

Plaintiff has no contract with the Defendant College.

III

Plaintiff has no right which would require Defendants to execute a contract with Plaintiff, or to employ Plaintiff.

IV

Defendants have not violated any constitutional rights of the Plaintiff.

Sindermann appealed, and the Fifth Circuit reversed and remanded for "further development of the facts" (A. 186). It rejected the district court's basic holding — that

because Sindermann had no tenure or contractual claim to reemployment he could have no cause of action for its denial — as inconsistent with the line of decisions establishing that a state may not condition the enjoyment of a privilege upon abstention from the exercise of First Amendment rights (A. 190-191). Looking to the record thus far made in the district court, it concluded that there was a factual dispute, precluding summary judgment, over "whether the college refused to renew the teaching contract on an impermissible basis — as a reprisal for the exercise of constitutionally protected rights" (A. 191, 192). Summary judgment in favor of defendants was "totally inappropriate in the case at bar, where the only affidavits on which summary judgment were based were submitted by the plaintiff and when there was a clear offer to prove facts constituting a constitutional claim." (A. 191-192).

Furthermore, the Court regarded the case as requiring remand even if it were to be assumed that the sole reason motivating the non-renewal were Sindermann's unauthorized absences (A. 191):

> "We reject the sophistry which would recognize that the college could not withhold renewal of Sindermann's contract because of his . . . exercise of a reasonable right to petition the legislature by attending committee hearings but, at the same time, recognize a right in the college administration to direct him not to exercise these rights then refuse to renew his contract for disobedience of their orders."

The court below then discussed the procedural due process allegations of the complaint. "Since the case must be remanded, it is appropriate that we comment on plaintiff's contention that the college denied him procedural due process by simply announcing that he would not be rehired and failing or refusing to give him a hearing" (A. 192). The court reiterated its prior holdings that (1) a

teacher with an "expectancy of reemployment" must be afforded notice and hearing prior to the decision not to renew, *Ferguson* v. *Thomas*, 430 F.2d 852 (1970) (A. 192); and (2) a teacher lacking such an expectancy nonetheless is entitled to an administrative hearing upon demand, following notice of non-renewal, if he "assert[s] that such non-renewal is really a form of punishment for his exercise of Constitutional rights" (A. 194). The court found the record thus far developed "too scanty" to determine whether Sindermann had an expectancy of reemployment (A. 193); what evidence was in the record "creates at least some doubt in this court's mind" that, as the College claimed, Sindermann lacked such an expectancy (A. 193, n. 8). While there was no dispute that Sindermann asserted that the non-renewal was punishment for the exercise of his Constitutional rights, and that he had demanded an administrative hearing, there was a dispute as to whether he had "jumped the gun" by filing his lawsuit without awaiting a response to his hearing request (A. 195). The court left the resolution of these factual questions, and thus of the ultimate procedural due process claims, to further development following remand to the district court.

SUMMARY OF ARGUMENT

1. The district court granted summary judgment to defendants because Sindermann had neither tenure nor a contractural right to reemployment and, therefore, "no right which would require defendants to execute a contract with plaintiff, or to employ plaintiff." This decision is plainly inconsistent with a long line of decisions of this Court holding that public employment, though it may be denied altogether, may not be conditioned upon forebearance from the exercise of First Amendment rights. While this principle has been applied most often to dismissals in mid-term, this court has also applied it to non-renewal of teachers for the following term. *Shelton* v. *Tucker*, 364 U.S. 479, 483,

484 (1960); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 592, (1967). In order to win, Sindermann will have to establish that his activities fell on the permissible side of the balance-line drawn in *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), but, if he can, his lack of tenure or a contractural right to reemployment is no defense.

2. The court below correctly held that, on the record thus far developed, factual disputes precluded summary judgment in favor of defendants on the question whether non-renewal violated Sindermann's First Amendment rights. Except for his two unauthorized absences (which fall into a grey area requiring balancing) all of Sindermann's efforts in the tenure and college elevation causes were clearly protected under the *Pickering* standards. Sindermann makes three claims here, as to each of which there is a factual dispute. (a) Even if the absences were not constitutionally protected, it is Sindermann's claim that he was denied reemployment because of the clearly protected activities, the absences merely being seized upon by the College as a pretext to effect his removal. The existence of legitimate grounds for dismissal is no defense if the *real* reason motivating it was the exercise of First Amendment rights. (b) Even if the absences were *one* of the reasons for Sindermann's non-renewal, there is no evidence to support a holding that they were the *only* reason, as defendants concede (brief, page 8). If non-renewal was motivated even in part by the exercise of First Amendment rights, it was improper. (c) Finally, even if the non-renewal were motivated *solely* by the absences, it would have to be decided whether the absences were protected activity under *Pickering*. While teachers do not have a right to absent themselves at will to engage in First Amendment activities, they may have a right to be absent where the occasion is important, expression impossible at other times, and the impact upon the school slight or non-existent. *Bomar* v. *Keyes,* 162 F.2d 136 (2d Cir. 1947), cert. denied 332 U.S. 825 (1947). On the

present record, any balancing of interests surely favors Sindermann. He had strong motivation to testify, he could do so only on the days when the hearings were held, he took special precautions to assure that his classes would be taught, and the College has not claimed any interference with its interests. Of course the College may have countervailing evidence not yet advanced which should be weighed in the balance, and it would be inappropriate to decide this important constitutional question on an abbreviated record. But surely defendants were not entitled to summary judgment.

3. Sindermann was entitled to notice and a hearing prior to the College's decision not to renew him. There are two quite distinct reasons why this is so.

(a) This court has held that, where a State undertakes to regulate or punish expression on the ground that it falls outside the First Amendment's protection, such action must be preceded by notice and hearing. *Speiser* v. *Randall*, 357 U.S. 513 (1958). Freedom of expression must be "ringed about with adequate bulwarks" so that protected speech will not be deterred by the fear that it might be punished as unprotected. As *Pickering* makes clear, the teacher's criticism of his superiors is an area where delicate line-drawing is required between protected and unprotected speech. Where, as here, non-renewal implicates the First Amendment, it must be preceded by notice and hearing. The court below agreed that a hearing was required for this reason, but it was of the view that such a hearing could *follow* non-renewal, with the burden of proof on the teacher to prove that his speech was protected. In both these respects, the decision below departs from decisions of this Court. Absent unusual circumstances (not present here), due process requires a hearing *before* injury is inflicted. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). And in such hearing the State must bear the burden of proving the speech unprotected. *Speiser* v. *Randall*, *supra*.

(b) The other reason why Sindermann was entitled to notice and hearing is applicable to all teachers, irrespective of the reason for their non-renewal: non-renewal visits severe injury upon a variety of protected interests, of such magnitude as to outweigh the "governmental interest in summary adjudication." *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Connell* v. *Higginbotham*, 403 U.S. 207 (1971). Teachers have a vital interest in retention of their jobs; job loss entails severe financial hardship, the disruption of established associations with colleagues and students, and the impossibility of pursuing one's teaching career without picking up roots and moving to another city with all that this entails. This Court has repeatedly emphasized that teachers' employment may not be withheld arbitrarily, but that doctrine is meaningless if the State need not disclose the reasons for non-renewal or afford an opportunity for the teacher to expose error. As a practical matter, non-renewal severely injures a teacher's reputation and, as the Rhode Island Commissioner of Education recently noted, "can mean the end of his professional career," for non-renewal renders teachers virtually unemployable. Finally, if teachers are not assured notice and hearing before non-renewal, academic freedom is out the window; few teachers will be bold enough to voice unpopular opinions knowing that they can be summarily denied non-renewal, and without even the assurance of being blessed — as Sindermann was — with a candid acknowledgement that expression was the reason. Each of these interests, and surely all of them combined, are "important" enough to entitle teachers to notice and hearing.

These interests are not outweighed by the "Governmental interest in summary adjudication." A hearing requirement would not impose an unmanageable administrative burden, as is demonstrated by the fact that most States accord hearings to tenured teachers prior to non-renewal, and

eleven States provide hearing to all teachers. Nor would a hearing requirement deprive States of flexibility in selecting the optimal teaching staff, for according procedures does not limit in any way the grounds upon which non-renewal may be predicated. Finally, a hearing requirement would not destroy the distinction between tenured and non-tenured teachers — a distinction which is not of constitutional dimensions in any event — because the essential advantage of tenure to the teacher is that it limits the *substantive* grounds upon which reemployment can be denied, and that advantage will remain even if *all* teachers are entitled to receive hearings.

4. If Sindermann's non-renewal was procedurally defective, because not preceded by notice and hearing, he is entitled to reinstatement with back pay, irrespective of whether the non-renewal was substantively justified. A procedurally defective decision is "illegal and of no effect," *Vitarelli* v. *Seaton*, 359 U.S. 535, 545 (1959); it must be "set aside," and the "slate . . . wiped clean." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Where employment termination is procedurally defective, the required remedy is automatic reinstatement with back pay. *Vitarelli, supra; Greene* v. *U.S.*, 376 U.S. 149 (1964); *Greene* v. *Howard University*, 412 F.2d 1128 (D.C. Cir. 1969). Simply according the denied procedures at this late day is insufficient, for "a substantive inquiry after the fact cannot possibly succeed in accurately ascertaining retrospectively what the outcome would have been had the procedural safeguards been afforded in the first instance." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 365, n. 18 (1963).

5. Although petitioners have not challenged federal court jurisdiction over this action, this Court has a similar question before it in another case, *Lynch* v. *Household Finance Corp.*, No. 70-6356, probable jurisdiction noted, 39 L.W. 3375 (March 1, 1971), and thus we discuss it. 28 U.S.C.

§ 1343(3) extends federal jurisdiction to every alleged violation of 42 U.S.C. § 1983, as is clear from the identity of language in the two provisions and the fact that they were adopted simultaneously in the Civil Rights Act of 1871. The Second Circuit's line of decisions limiting the scope of 28 U.S.C. § 1343(3) to alleged deprivations of "liberty" (as distinguished from "property") is inconsistent with *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437-438 (1971). In any event, even under the Second Circuit's "liberty-property" dichotomy federal jurisdiction extends to the instant case, for the interests claimed to have been violated — freedom of expression and freedom to pursue one's profession — are rights of "liberty."

ARGUMENT

I. A PUBLIC COLLEGE MAY NOT DENY RENEWED EMPLOYMENT TO A TEACHER BECAUSE HE HAS EXERCISED HIS FIRST AMENDMENT RIGHTS

The district court granted summary judgment in favor of defendants because Sindermann had neither tenure nor a contractual right to reemployment and, therefore, "no right which would require Defendants to execute a contract with Plaintiff, or to employ Plaintiff" (A. 107). The court below rightly reversed this ruling as contrary to well-established principles.

Although Sindermann may not have had a "right" to reemployment, the College nonetheless could not condition reemployment upon his forebearance from exercising federal Constitutional rights. "It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of Constitutional guarantees." *Epperson* v. *Arkansas*, 393 U.S. 97, 107 (1968).

We may assume, for present purposes,[9] that a teacher's

[9] But see pp. 36, *infra*.

continued employment is but a "privilege," and not a "right." Even so, the State may not condition enjoyment of that "privilege" upon the surrender of First Amendment rights. But Sindermann claims that it has withheld a privilege which he might otherwise enjoy—the privilege of teaching in the College—because of their exercise and, by thus treating him, has served notice on others similarly situated that they may expect the same consequences should they be equally bold. Such conditions offend the Constitution, as this Court made clear as early as *Frost* v. *Railroad Commission*, 271 U.S. 583, 593-594 (1926):

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of those limitations is that it may not impose conditions which require the relinquishment of Constitutional rights. If the state may compel the surrender of one Constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."

This Court repeatedly has applied this principle to teachers in public educational institutions. Although such teachers have had neither tenure nor contractual claims to their jobs, "This Court has . . . rejected the contention that speech was not abridged when the sole restraint on its exercise was withdrawal of . . . the opportunity for public employment." *Speiser* v. *Randall*, 357 U.S. 513, 518-519 (1958). See, e.g., *Pickering* v. *Board of Education*, 391 U.S. 563, 566 (1968); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952). See also Van

Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 Duke L. J. 841, 843-858 (1970).

While this principle has most often been applied to dismissals of teachers in mid-term of the school year, this Court has made clear that it is equally applicable to the non-renewal of teachers for the following term. One of the petitioners in *Keyishian*—Keyishian himself—was a teacher whose "one-year-term contract was not renewed" (385 U.S. at 592). So too, the petitioners in *Shelton* were a teacher whose "contract for the ensuing school year was not renewed" (364 U.S. at 483), and two teachers who "were advised that their failure to comply . . . would make impossible their re-employment as teachers for the following year" (*Id.*, at 484). In each case, this Court held that conditioning renewal upon surrender of First Amendment rights was beyond the State's power.

These holdings were inevitable; for the courts to have found a meaningful distinction between dismissal and non-renewal cases would have invited subterfuge. Thus, through the simple expedient of delaying "dismissal" actions a short time to correspond with the termination of the school year, the State could vitiate a teacher's exercise of constitutional rights. Such a result, of course, is untenable.

To be sure, this Court has recognized that a balance must be struck "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra,* 391 U.S. at 568. But, precisely because of the district court's erroneous analysis of the law, that balance is yet to be struck in this case. And when it is, if it is determined that Sindermann did not transcend the bounds of speech permitted to a public teacher, the State cannot justify his non-renewal on the ground that he lacked tenure or a contractual right to re-employment.

The decision of the Tenth Circuit to the contrary in *Jones* v. *Hopper*, 410 F.2d 1323 (1969), cert. denied 397 U.S. 991, is an aberration. It is squarely in conflict with the overwhelming weight of judicial authority. See, for example, *Shelton, supra; Keyishian, supra; Pred* v. *Board of Public Instruction*, 415 F.2d 851 (5th Cir. 1969); *Ferguson* v. *Thomas*, 430 F.2d 852 (5th Cir. 1970); *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967); *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); and *Roth* v. *Board of Regents*, No. 18490 (7th Cir., July 1, 1971). For the reasons explained above, we submit that *Jones* is plainly wrong. Indeed, the Tenth Circuit itself is presently reexamining *Jones* in the context of its *en banc* consideration of *O'Neil* v. *Board of Education*, No. 693-70.

II. THE COURT BELOW CORRECTLY HELD THAT FACTUAL DISPUTES PRECLUDED GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

We have shown that Sindermann's lack of tenure or a contractual right to reemployment was no defense if he could establish that non-renewal was visited for the exercise of First Amendment rights not inconsistent with his role as a teacher. We now show that, as the court below held, there existed a factual dispute precluding summary judgment on whether such exercise was, indeed, the reason for his non-renewal.

At the outset it must be noted that most of Sindermann's "First Amendment" activities fell clearly on the permissible side of the balance commanded in *Pickering*. His speeches, testimony, and associational activities in support of a State tenure law, and his activities in support of the elevation of Odessa College to four year status, have not even been alleged (let alone proved) to have been false or defamatory;

they were "in no way directed toward any person whom [Sindermann] would normally be in contact in the course of his daily work as a teacher" (*Pickering*, 391 U.S. at 569-570); they threatened neither discipline nor harmony among co-workers (*ibid*); and they were clearly issues as to which teachers at Odessa College were in a unique position to provide information which the public (and the Texas legislature) would want to have in determining the direction of State policy. Only one of Sindermann's many activities—absenting himself on two occasions to testify before Texas legislative committees—can be said to fall into the "grey zone" calling for more delicate balancing under the *Pickering* test.

With this preliminary observation, we turn to the nature of Sindermann's claims. As we will show, there are at least three distinct reasons why, on the record thus far formulated in the district court, summary judgment could not be granted in favor of defendants.

First, even assuming that Sindermann's absences were not Constitutionally protected, it is his claim that they were not the real reason for his non-renewal. Rather, he contends, it was his advocacy of a tenure law[10] and the elevation of the College which motivated the defendants not to renew him, and the absences were merely seized upon as a pretext to effect his removal from the College.

If Sindermann could prove this claim, it is clear that he would be entitled to relief. A state may not mask a Constitutionally impermissible non-renewal by asserting pre-

---

[10] Texas has no tenure law covering public college teachers. The only "tenure" afforded faculty members at the College is described in the Faculty Guide thusly: "*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work" (A. 15).

textural reasons for its action. Cf. *Johnson* v. *Branch, supra,* 364 F.2d at 182:

> "The only reasonable inference which may be drawn from the failure to renew Mrs. Johnson's contract in the face of her splendid record of twelve years *on such trivial charges* was the Board members' objections to her [civil rights] activity." (Emphasis added).

Accord: *Fluker* v. *Alabama State Board of Education,* No. 30670 (5th Cir., March 31, 1971) (slip opin., p. 18). See also *Chase* v. *Fall Mountain Regional School Dist.,* Civ. Ac. 3112 (D.N. H., July 28, 1971): "When a violation of Constitutional rights is alleged . . . the reasons given for dismissal must be closely examined to make certain that they are not simply a facade to conceal the fact that dismissal was for activity protected by the Constitution." (slip opin., p. 17).[11]

On the present record, there was ample evidence to preclude summary judgment against Sindermann on this issue. He had taught in Texas colleges for ten years, and at this College for four, and there is no evidence that he was

---

[11] Closely analogous are decisions under the National Labor Relations Act, 29 U.S.C. § 151 et seq. That Act forbids discharges motivated by employees' union activities (Section 8 (a) (3), 29 U.S.C. § 158(a) (3)), but otherwise permits an employer to discharge employees for "cause" (Section 10(c), 29 U.S.C. § 160(c)). Taken together, these provisions preclude interference with the employer who discharges employees "because of misconduct." *Fibreboard Corp.* v. *Labor Board,* 379 U.S. 203, 217 (1964). But "a justifiable basis for discharge is no defense . . . if such ground is used as a pretext and is not the motivating cause of discharge." *Singer Company* v. *NLRB,* 371 F.2d 623, 624 (8th Cir. 1967). The "question . . . was not whether there existed a valid ground for discharge, but whether the stated ground was the real one." *J. P. Stevens & Co.* v. *NLRB,* 380 F.2d 292, 300 (2nd Cir. 1967), cert. denied 389 U.S. 1005 (1967). An employee's "unexcused leaving of his job" may not be "seized upon" as a pretext for discharge where the employer's real motive is "to rid itself of a union man." *NLRB* v. *Murray Ohio Manufacturing Co.,* 326 F.2d 509, 517 (6th Cir. 1964).

other than a fully competent teacher throughout his career. His colleagues in the Social Science Department have so declared (A. 52), and the fact that he was named co-chairman of the Department for a time (A. 12) signifies that the College administration must have agreed. The press release issued by the College President, explaining Sindermann's non-renewal, manifested great hostility to the full gamut of Sindermann's First Amendment activities. Sindermann had an "addiction" to writing "lengthy letters" to his colleagues (A. 12); the efforts of "various people" to elevate the College to four year status was "unfortunate" (A. 13); Sindermann "saw fit to align himself with this group in contradiction to a policy statement of the Board of Regents in the matter" (A. 14); this group's efforts led to "dissension" (A. 15); the ad published by this group was "disgusting", and although Sindermann disclaimed responsibility for the ad "his 'guilt by association' cannot be refuted, because he had acted with this group, opposed to a stated position of the Board of Regents" (A. 15);[12] the Board of Regents, "given the information above . . . expressed disapproval of Mr. Sindermann's actions." (A. 20).

Moreover, the College's actions in refusing Sindermann's requests to be absent to testify cast doubt that the absences were the real reason for his non-renewal. The first request, seeking a one day absence, was forwarded to the College President, who prepared a four-point response denying it, three of these points having nothing to do with the need for Sindermann's services on that day (A. 16-17); Sindermann claims that those who substituted for him during the first absence were "intimidated" for doing so (*infra*, p. 4a); the Faculty Guide, on its face, suggests that permission is needed only for *paid* absences, and that the lone consequence for unexcused absence is loss of one day's pay

---

[12] Cf. *Keyishian v. Board of Regents, supra,* 385 U.S. at 607 (there is "no place" for "the doctrine of 'guilt by association' ").

(*supra*, p. 5); the College offered no evidence that non-renewal is a customary consequence of two days' unauthorized absence, and disparate treatment is a key factor supporting a finding of pretextual motivation, *NLRB* v. *Park Edge Sheridan Meats, Inc.*, 341 F.2d 725, 728 (2d Cir. 1965); and two days' absence surely is an unlikely basis for denying renewal to one who has taught in the College for four years.

In sum, on the record thus far made, the court below correctly concluded that "the truth . . . was far from clear. The basic facts, as well as the material inferences to be drawn therefrom, were in total dispute. Summary judgment was improper." (A. 192).[13]

Second, even if Sindermann's absences were *one* of the reasons for his non-renewal, there is no evidence to support a holding that they were the *only* reason. Even the press release, a wholly self-serving document, did not assert that the absences, as distinguished from Sindermann's other First Amendment activities, were the sole basis for non-renewal. Indeed, the most that defendants can muster in their brief to this Court (page 8) is that Sindermann's absences were "one of the reasons for failing to renew his contract."

Teachers are entitled to reinstatement if they can establish "that the University's action was even *partially* in retaliation for their anti-administration activities." *Fluker*

---

[13] This holding comports with the general recognition, in NLRB cases, that issues of motivation turn peculiarly upon the facts, and upon the trier of facts' observations of the demeanor of the witnesses. Such cases require "a delicate factual determination." *NLRB* v. *Park Edge Sheridan Meats, Inc., supra*, 341 F.2d at 728. "Ascertaining an employer's motives frequently presents perplexing problems for the fact finder." *Betts Baking Co.* v. *NLRB*, 380 F.2d 199, 204 (10th Cir. 1967). "[W]here . . . contradictory reasons for the discharge of an employee are advanced, it is the responsibility of the [trier of fact] to weigh the evidence and resolve the factual conflict." *NLRB* v. *Buitoni Foods Corp.*, 298 F.2d 169, 174 (3rd Cir. 1962).

v. *Alabama State Board of Education, supra* (slip opin., p. 22) (emphasis added). See also *Roth* v. *Board of Regents,* 310 F.Supp. 972, 982 (W.D. Wisc. 1970), affirmed No. 18490 (7th Cir., July 1, 1971); *Montgomery* v. *White,* 320 F. Supp. 303, 305 (E.D. Tex. 1969).

Here again, the NLRB decisions teach that a discharge even partially motivated by impermissible reasons is unlawful. "[I]f a desire to stifle protected activity is *a factor* in the employer's decision, the discharge is discriminatory." *NLRB* v. *Hanes Hosiery Division,* 413 F.2d 457, 458 (4th Cir. 1969; emphasis added). Although a discharge was motivated partially by an employee's unexcused absences, "it is enough" to establish illegality "that a discriminatory motive was a factor in the employer's decision." *Winchester Spinning Corp.* v. *NLRB,* 402 F.2d 299, 304 (4th Cir. 1968). "If employees are discharged partly because of their participation in a campaign to establish a union and partly because of some neglect or delinquency, there is nonetheless a violation . . ." *NLRB* v. *Jamestown Sterling Corp.,* 211 F.2d 725, 726 (2d Cir. 1954).[14]

The press release declares that the College had shown "tolerance" toward Sindermann's earlier activities (A. 17-18) and might be read as indicating that the unauthorized absences were the "final straw." Even if that is what the author meant, "there is clearly no obligation . . . to accept at face value the reason advanced by the employer." *NLRB* v. *Buitoni Foods Corp., supra,* 298 F.2d at 174. But even if it were true it would not justify the non-renewal, for even then constitutionally protected activities were *among* the straws which motivated the non-renewal. Cf. *Fluker* v. *Alabama State Board of Educ., supra* (slip opin.,

---

[14] See also *J. P. Stevens & Co.* v. *NLRB, supra,* 390 F.2d at 300; *NLRB* v. *L. E. Farrell,* 360 F.2d 205, 208 (2d Cir. 1966); *NLRB* v. *West Side Carpet Cleaning Co.,* 329 F.2d 758, 761 (6th Cir. 1964); *NLRB* v. *Great Eastern Color Lithographic Corp.,* 309 F.2d 352, 355 (2d Cir. 1962), cert. denied 373 U.S. 950 (1963).

p. 18); *NLRB* v. *Great Eastern Color Lithographic Corp.*, *supra*, 309 F.2d at 355.

Third, even if it were established that the unauthorized absences were the *real* and *only* reason for the non-renewal, summary judgment would be improper. For there would remain for determination whether the College was entitled to forbid Sindermann's requests.

This issue, as we have acknowledged, falls into the grey area in which *Pickering* calls for balancing. Clearly, teachers are not entitled to absent themselves whenever they choose to exercise their First Amendment rights. But does it follow that they may never do so, no matter how important the occasion, how impossible their exercise at other times, and how little inconvenience is caused the school?

In the only case we have found which discusses this issue, *Bomar* v. *Keyes*, 162 F.2d 136 (2d Cir. 1947), cert. denied 332 U.S. 825 (1947), it was concluded that a balancing of interests was required. There, a teacher absented herself for a month to serve on a federal jury, although entitled to an exemption from jury duty had she sought one. Discharged for her absence, she sued under 42 U.S.C. § 1983.[15] The district court dismissed her complaint, but the Court of Appeals reversed and remanded for trial. In its decision, by Judge Learned Hand, the court explained (*id* at 139):

> "We do not mean to suggest that a teacher may absent herself from her work indefinitely, and serve on a jury without regard to her duty; i.e., that she may choose her own time or stay away as long as she pleases. Certainly there are 'reasonable' limits to the exercise of her privilege; but the question whether she kept within such limits we cannot decide now;

[15] Then 8 U.S.C.A. § 43.

it must be tried, for all we have is that her service as such was the ground for her discharge."

If a balancing of interests is called for, the present record surely favors Sindermann. He had strong reasons for wishing to testify on the two bills he was supporting, and could do so only by absenting himself on the two days when the Texas legislature scheduled its hearings. He arranged for other members of his Department to teach his classes, so that the curriculum would not be interrupted, and offered to pay them out of his own pocket. If the College believes that his absences caused harm to its curriculum, or harmed its interests in any other way, it has yet to say so.

Of course, the College may have evidence not yet advanced which should be weighed in the balance, and it would be wholly inappropriate to decide this important constitutional issue on an abbreviated record. This is all the more true because the issue probably need never be reached, it being doubtful the absences will emerge as the sole reason for the non-renewal. But surely the Fifth Circuit was correct in concluding that on this record summary judgment could not be granted in favor of *defendants*.

III. SINDERMANN WAS ENTITLED TO NOTICE AND HEARING PRIOR TO THE DECISION NOT TO RENEW HIM

The complaint in this action alleges not only that the non-renewal was substantively defective (because visited as retaliation for the exercise of First Amendment rights) but also that it was procedurally defective (because Sindermann was afforded neither notice nor a hearing on the proposed non-renewal). It is Sindermann's position that he was entitled to notice and a hearing prior to the decision not to renew him and that, such procedures not having been afforded, he is entitled to reinstatement with back pay irrespective of whether there existed valid grounds for his non-renewal.

We detail these contentions herein. Before doing so, we are obliged to take note of the curious posture in which the procedural due process issues come before this Court. The court below did not purport to resolve these issues finally, but merely found it "appropriate" to reiterate its conception of the controlling rules "since the case must be remanded" (A. 192). While the rules enunciated by the court below are not as broad as those which Sindermann believes warranted, it is conceivable (though hardly assured) that they are broad enough to afford Sindermann all the relief which he seeks. For these reasons—and particularly because of the interlocutory nature of the court below's discussion of these issues—Sindermann did not petition for certiorari. Defendants, of course, did petition, but their petition concentrated most of its fire on the substantive due process issues, and gave at most passing indication that defendants were displeased with the comments of the court below relating to procedural due process (Petition, pp. 14, 20). But in an *amicus* brief, the National Education Association strongly urged that certiorari be granted to resolve the conflict among the circuits on the procedural due process issues.[16] This Court granted certiorari without delineating the issues to be argued. In their brief on the merits to this Court (pages 12-13) defendants have argued—much more explicitly than in the petition—that the court below erred in its procedural due process comments. Accordingly, although not sure whether the issues are properly before the Court or whether the Court will choose to reach them, we present our arguments on procedural due process.

There are two wholly separate bases for the conclusion that Sindermann was entitled to notice and a hearing prior

---

[16] Although urging that certiorari be granted because of the conflict, the NEA's brief made clear that it supported Sindermann's position (Brief for NEA, p. 4).

to non-renewal. The first arises out of the fact that the grounds for non-renewal (regardless which of those in the press release truly motivated the decision) necessarily had First Amendment implications, and this Court has made clear that any attempt to punish expression on the ground that it falls outside the First Amendment's protections must be preceded by notice and a hearing.[17] The second, wholly independent reason is one which is applicable to all teachers in public educational institutions: they have important interests which are adversely affected by non-renewal, and thus are entitled to notice and hearing.

A. Where, As Here, Non-Renewal Is Contemplated for Reasons Which Implicate the First Amendment, the Decision Must Be Preceded By Notice and Hearing.

This Court has repeatedly recognized that "the freedoms of expression must be ringed about with adequate bulwarks." *Blount* v. *Rizzi*, 400 U.S. 410, 416 (1971); *Bantam Books* v. *Sullivan*, 372 U.S. 58, 66 (1963). "The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finely drawn." *Speiser* v. *Randall, supra*, 357 U.S. at 525. Separating "legitimate from illegitimate speech" requires "sensitive tools." *Ibid.* And the "tools" which this Court has prescribed for this purpose are notice and a hearing preceding state action.

---

[17] We do not, in this brief, attempt to delineate the precise attributes which a due process hearing should possess. Since Sindermann was afforded no hearing whatsoever, his rights were violated unless he had no right to a hearing of any type. We do endorse the general conclusions of the court below that any hearing should be before an impartial tribunal and should include the right to produce witnesses and evidence and to confront and cross-examine the College's witnesses, (A. 194), preceded by notice of the reasons for non-renewal "in sufficient detail to enable him to show any error that may exist" together with "the names and the nature of the testimony of witnesses against him" (A. 193; *Ferguson* v. *Thomas, supra*, 430 F.2d at 856).

This rule was not adopted to glorify speech which is *not* protected, but to assure against infringement of speech which *is*. "Where the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights." *Id.* at 521. The concern is that "where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding . . . will create the danger that the legitimate utterance will be penalized." *Id.* at 526. Absent procedures carefully designed to distinguish the two, those who contemplate unpopular advocacy "necessarily must steer far wider of the unlawful zone. . . . In practical operation, therefore, [the absence of adequate procedures] must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free . . ." *Ibid.*

This principle has been discussed most often in contexts where the line between protected and unprotected speech is difficult to draw, e.g. loyalty and obscenity cases. As *Pickering* makes clear, the teacher's criticism of his superiors is yet another area where difficult line-drawing is required. The interests of the teacher-*qua*-citizen, and the school-*qua*-employer must be balanced (391 U.S. at 568). That balancing is not an easy process. "Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal," this Court thought it not "feasible to lay down a general standard against which all such statements may be judged." (*Id.* at 569). It merely indicated "some of the general lines along which an analysis of the controlling interests should run" (*Ibid*).

Given the delicate line prescribed in *Pickering*, teachers will speak at their peril unless they are assured that procedural safeguards will precede any deprivation of employ-

ment. Can it be doubted that, in the light of Sindermann's fate, the more-than-100 other teachers at Odessa College will think twice before picking up his cudgels? Or that the restraint will be felt on speech which is clearly protected? The ax of non-renewal can fall swiftly and summarily, and those who would emulate Sindermann lack the assurance that their ouster will be accompanied by a revealing press release which furnishes the basis for a § 1983 action.

Nor is it any answer that, if Sindermann's actions were constitutionally protected, he can secure ultimate relief in a § 1983 action. Indeed, that alternative was equally available in the other situations where this Court has required predetermination hearings. The reasons for its inadequacy are obvious. Many teachers cannot afford the costs of federal court litigation. Many of those who can might reasonably fear that suing their former employer would mark them a "troublemaker" and thus impede their chances of obtaining teaching employment elsewhere.[18] Even for those prepared to run this gamut, the prospect of extended unemployment while the legal battle is fought is so high a price as to exert its own "chilling effect." Cf. *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967). And even if all these hurdles are surmounted by a teacher who, undeterred, exercises his First Amendment rights and is nonrenewed, the "chilling effect" on the colleagues he leaves behind will last at least for the extended period until a legal victory is obtained. In sum, absent pre-termination procedures which assure teachers that the exercise of First Amendment rights will not result in summary dismissal, the inevitable consequence will be that teachers will steer "far wider of the unlawful zone."

---

[18] That such has been Sindermann's fate is suggested by his subsequent plight. He has applied to more than 100 colleges over the past two years, but has been hired by none. His most promising prospect, Montgomery County Junior College, Maryland, fell through when this Court's grant of certiorari publicized his prior history. See p. 41, n. 27, *infra,* and affidavit printed at pp. 9-14a., *infra.*

The court below, cognizant of these considerations, declared that a teacher who believes that non-renewal was motivated by his exercise of First Amendment rights may demand a hearing *following* notice of non-renewal, but that "the teacher must bear the burden of proving that a wrong has been done" (A. 193). In two respects, this procedure falls short of that decreed by prior decisions of this Court: (1) the hearing must *precede* non-renewal; and (2) the burden of proof must rest with the State.

(1) The "root requirement" of due process is "that an individual be given an opportunity [for] a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut,* 401 U.S. 371, 379 (1971) (emphasis added). "[D]ue process demands that the speech be unencumbered *until* the State comes forward with sufficient proof to justify its inhibition. The State clearly has no such compelling interest at stake as to justify a short-cut procedure . . ." *Speiser* v. *Randall, supra,* 357 U.S. at 529 (emphasis added).[19] Here, there was no governmental interest justifying a postponement of the hearing. Sindermann was permitted to continue teaching for the duration of the current term, which extended weeks beyond the date he was notified of non-renewal, and he would not have resumed teaching until the fall. Accordingly, he was entitled to a hearing prior to the decision not to renew his employment.

(2) When a State proposes to deny a privilege to one whom it alleges has engaged in unprotected speech, due process requires that the State bear the burden of proving

---

[19] See also, *Bell* v. *Burson,* 402 U.S. 535, 542 (1971); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 339-341 (1969); *Goldberg* v. *Kelly,* 397 U.S. 254, 263-266 (1970); *Armstrong* v. *Manzo,* 380 U.S. 545, 550-551 (1965); *Mullane* v. *Central Hanover Tr. Co.,* 339 U.S. 306, 313 (1950).

that the speech was not protected. As this Court explained in *Speiser* v. *Randall, supra,* 357 U.S. at 525-526:

> "[W]here the burden of proof lies may be decisive of the outcome. . . . Where the transcendant value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in [unprotected] speech.
>
> "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding . . . will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear those burdens."

See also *Armstrong* v. *Manzo, supra,* 380 U.S. at 551.

B. Teachers in Public Education Systems Are Entitled to Notice and Hearing Prior to a Decision that They Will Not Be Renewed, Irrespective of the Reason for Non-Renewal.

In the preceding section, we have shown that because First Amendment considerations were clearly implicated in Sindermann's case he was entitled to a hearing prior to the decision not to renew his employment. We turn now to a wholly different consideration: whether teachers in public educational institutions have a right to a hearing before being non-renewed irrespective of the reason for non-renewal.

This Court has repeatedly held that "the right to be heard before being condemned by the State to suffer *grievous loss of any kind*" is a basic requisite of due process. See, e.g., *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971); *Goldberg* v. *Kelly, supra; Greene* v. *McElroy,* 360 U.S. 474 (1959). There was a time when it was thought that this doctrine was limited only to the loss of "rights," but more

recent decisions of this Court have made clear that procedural due process is required whenever the State proposes to interfere with "important interests" of the citizen, regardless whether these interests be "denominated a 'right' or a 'privilege'." *Bell* v. *Burson, supra,* 402 U.S. at 539. See also *Speiser* v. *Randall, supra; Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239, n. 5 (1957); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968).

Whether the loss of government employment is such a "grievous loss" as to warrant procedural due process is an issue upon which this Court's decisions are not consistent. Most recently, in *Connell* v. *Higginbotham,* 403 U.S. 207, 208 (1971), this Court followed the "decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process." See also, *Slochower, supra,* 350 U.S. at 559; *Goldberg* v. *Kelly, supra,* 397 U.S. at 262; *Bell* v. *Burson, supra,* 402 U.S. at 539. In other cases, however, this Court's decisions have contained *dicta* looking the other way. See, e.g., *Vitarelli* v. *Seaton,* 359 U.S. 535, 539 (1959); *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 896 (1961).[20] We will discuss

[20] *Cafeteria Workers* is widely misconstrued as having *held* that public employees do not have a right to procedural due process when their job is threatened. In fact, however, its holding was very much narrower. It held only that a short-order cook employed by a private contractor in a cafeteria on a military installation was not entitled to a hearing prior to the withdrawal of her access to the installation. The Court concluded that the individual interests involved were not terribly important, as her employer was prepared to employ her at another of its restaurants (367 U.S. at 888), the withdrawal of access was not likely to injure her reputation (*Id.* at 898), there was no evidence that her "employment opportunities anywhere else" would be impaired (*Id.* at 898-899), and she was not even precluded from obtaining employment "on any other federal property" (*Id.* at 899, n. 10). The Court proceeded to balance this very limited individual interest against the government's traditional power to exercise "unfettered control" of "the internal operation of an important federal military establishment" (*Id.* at 896), and concluded *on balance* that procedural due process was not required.

herein several "interests" of the teacher which are damaged by non-renewal, and which, we contend, entitle teachers to notice and hearing prior to non-renewal.

Of course, like most constitutional protections, the "right to be heard" is not absolute. The individual's interests must be weighed against "the governmental interest in summary adjudication." *Goldberg* v. *Kelly, supra,* 397 U.S. at 263. Accordingly, we also discuss herein the competing governmental interests which must be weighed against the individual teacher's interests on procedural due process.

(1) *The Teacher's Interest in Retention of His Job.*

It can hardly be gainsaid that a teacher's loss of his job visits severe injury upon him. Teachers generally are not paid at levels enabling them to accumulate the kind of savings which would tide them over extended periods of unemployment. Thus, non-renewal threatens severe financial hardship. It threatens less tangible, but nonetheless real, consequences as well: the disruption of established associations with colleagues and students and, in a case like Sindermann's, the impossibility of pursuing one's professional career without picking up roots and moving to another city with all that that entails.[21] As this Court has recognized, cessation of wages "may as a practical matter drive a wage earning family to the wall." *Sniadach, supra,* 395 U.S. at 341-342 (1969). Exclusion from Government employment can "seriously impair [the] chance to earn a living" and is "punishment . . . of a most severe type." *U.S.* v. *Lovett,* 328 U.S. 303, 314, 316 (1946). See also *Ricucci* v. *U.S.,* 425 F.2d 1252, 1256-1257 (Ct. Claims 1970) (concurring opinion) (likening the terminated public employee to the welfare recipient in *Goldberg* v. *Kelly, supra*).

---

[21] This assumes, of course, that the non-renewed teacher is able to secure other employment in his field. As we show in (3), *infra* pp. 37-41, non-renewal seriously jeopardizes the teacher's ability to obtain such other employment.

(2) *The Teacher's Right not to be Arbitrarily Terminated.*

The old notion that there is no "right" to Government employment—while not determinative in any event of the right to procedural due process—is not really accurate. For this Court has repeatedly made clear that a public employee *does* have a right not to be terminated for reasons which are "arbitrary." *Wieman* v. *Updegraff, supra,* 344 U.S. at 192:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that Constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary."

The "very essence of due process" is the "protection of the individual against arbitrary action," a protection which this Court has insisted upon for the public employee, *Slochower, supra,* 350 U.S. at 551, as well as for others whose interests are affected by State action. *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960); *U.S. ex rel. Vajtauer* v. *Comm. of Immigration,* 273 U.S. 103 (1927); *Schware* v *Board of Bar Examiners, supra.* Thus, a termination is defective if the reasons are "wholly without support" (*Slochower, supra,* 350 U.S. at 551), if there is "no evidence which rationally justifies" the asserted basis for termination (*Schware, supra,* 353 U.S. at 246-247) and, even where a basis has evidentiary support, if there is no "rational connection" between that basis and fitness to teach. (*Id.* at 239).

The teacher's right to be free of arbitrary dismissal is meaningless, however, unless accompanied by procedural due process. For if the State need not disclose the reason for non-renewal, there is no assurance that it *has* a reason which would pass constitutional muster. And even if it has a reason, it may be wholly lacking in evidentiary support

and easily refutable—"easily", that is, if the teacher knows the reason and is accorded a hearing to refute it.[22] Indeed, absent a requirement of notice and hearing it is likely that the State, however well-intentioned, will lapse into making termination decisions without even the internal discipline of inquring whether its decision is rationally justified.

We submit that the teacher's personal stake in continued employment, and his "right" to be free of its arbitrary deprivation, are interests of sufficient importance to entitle him to notice and hearing prior to non-renewal.

(3) *Injury to Reputation and Inability to Pursue the Teaching Profession*

A number of lower courts, deterred, by the notion that there is no "right" to public employment, from holding that job retention is itself an interest deserving procedural protection, have carried the analysis further. These courts have held that "whenever there is a substantial interest,

---

[22] A classic example of the dangers which would be involved were there no right to notice or hearing was presented in *Chase* v. *Fall Mountain Regional School Dist., supra.* A teacher was denied renewal because of rumors, neither investigated nor verified, that he had made sexual advances upon a female student. The Court, directing reinstatement of the teacher, stated (slip opin., pp. 21-22):

> "To dismiss a teacher on the basis of univestigated complaints and unverified rumors and to admit that the decision does not depend on the truth or falseness of the complaints and rumors is patently unjust, arbitrary, and capricious. If the possibility, let alone the probability of the truth of the facts involved is not known, a decision cannot be reasoned or based on substantial evidence. The implications of such a decision are frightening. It means that any student with a personal dislike for a teacher could bring his career to an end by a complaint wholly unjustified and unsubstantiated in fact. In the same sense, a malicious group in the community could start unsubstantiated rumors resulting in dismissal. Further, an administrator or another teacher bent on a personal vendetta could, by insidiously starting false rumors, bring about the dismissal of a totally innocent teacher."

other than employment by the state, involved in the discharge of a public employee" he is entitled to procedural due process. *Birnbaum* v. *Trussell,* 371 F.2d 672, 678 (2d Cir. 1966). A number of courts have held that the adverse effect non-retention would have upon a teacher's reputation and ability to pursue his profession elsewhere created a sufficient interest to entitle that teacher to notice and a hearing. *Roth* v. *Board of Regents,* No. 18490, 40 L.W. 2060 (7th Cir. July 1, 1971) (non-renewal of a teacher by a public college); *Shirck* v. *Thomas,* No. 18790 (7th Cir. Sept. 2, 1971) (non-renewal of a public high school teacher); *Drown* v. *Portsmouth School District,* 435 F.2d 1182 (1st Cir. 1970), cert. denied, 39 L.W. 3511 (May 18, 1971) (non-renewal of a public school teacher; held: entitled to a written statement of reasons and an evaluation report but not a hearing). See also cases discussed at pp. 39-41, *infra.*

This Court has squarely held that "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau, supra,* 400 U.S. at 437. It has likewise held that procedural due process must attend the State's denial of a person's right to pursue his profession, *Schware, supra; Konigsberg* v. *State Bar,* 353 U.S. 252 (1957), or the taking of action which would impede pursuit of a profession, *Bell* v. *Burson, supra,* 402 U.S. at 539.

The classroom is a uniquely sensitive arena,[23] and it is widely recognized that a teacher whose reputation has been clouded by non-renewal stands little chance of securing a teaching position in another school system. As the Rhode Island Commissioner of Education recently noted, in the

---

[23] Teachers "have captive audiences of young minds," *Keyishian, supra,* 385 U.S. at 607, and this Court has recognized the State's intense interest in assuring the fitness of those who teach in its schools, *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952).

teaching world non-renewal is considered a "dismissal," and "dismissal [of a teacher] from his position, whether it be during a school year or at the end of a school year can mean the end of his professional career." [24] Similarly, the Chairman of the U.S. Civil Service Commission recently explained, "Being fired from government carries a stigma that prevents many employees from perhaps ever finding gainful employment again." [25] This is not mere speculation on our part. The compelling nature of the problem confronting the non-renewed teacher has been expressed poignantly in a massive number of recent court decisions. The below quoted statements are illustrative:

> "Discharge (or failure to rehire) is a blemish that can permanently scar his record and effectively limit any chance he [the plaintiff] has to be rehired as a teacher in this state. Since there is little or no reciprocity for teachers between states, such damage to his teaching credentials in his chosen profession may indeed destroy his career." *Munro* v. *Board of Education of Elk Rapids Schools*, 383 Mich. 661, 692 (Mich. Sup. Ct. 1970) (dissenting opinion of T. G. Kavanagh, J), adopted as the majority opinion of the Court upon reconsideration (No. 52, 508, decided June 18, 1971).
>
> "There is no doubt that non-renewal effectively prevents a teacher from obtaining another teaching position, thereby preventing a teacher from pursuing his chosen profession." *Chase* v. *Fall Mountain Regional School Dist., supra,* at slip opin. p. 20.
>
> "There can be no question that in terms of money and standing and opportunity to contribute to the educational process, the consequences of [non-renewal] to

---

[24] *Domenicone* v. *School Committee,* R.I. Commissioner of Education, May 20, 1970, pp. 3, 4.

[25] Statement of Robert Hampton, *Washington Evening Star,* April 12, 1971, p. A-8.

him [the teacher]-probably will be serious and prolonged and possibly will be severe and permanent. 'Badge of infamy' is too strong a term, but it is realistic to conclude that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." *Roth* v. *Board of Regents,* 310 F.Supp, 972, 978-979 (D. Wisc. 1970), aff'd., No. 18490 (7th Cir., July 1, 1971).[26] See also, *Petrullo* v. *McCain,* Civ. Ac. No. T-4850 (D. Kan. July 7, 1971) (slip. opin, at p. 5).

"The decision . . . not to reappoint and accord tenure to plaintiff has caused, and unless such decision is restrained from enforcement, will continue to cause, the plaintiff damages to his professional reputation and standing *and severely hamper his opportunities for employment* at other institutions of higher learning, for which there is no adequate remedy at law." *Auerbach* v. *Trustees of the Calif. State Colleges,* Civ. Ac. No. 71-1126-F (C.D. Calif., August 18, 1971) (slip opin. at p. 6).

"It is fairly inferable that one reason, if not the only one, why plaintiff has been unable to secure employment as a public school teacher is because he was dismissed by the Monson school committee for no stated reasons. After remaining unemployed for six weeks plaintiff secured a factory job with Springfield Molders Company at $75 per week which he held for a period of ten weeks; since then he has earned $80 per week with a car manufacturing firm." *Lucia* v. *Duggan,* 303 F.Supp. 112, 116 (D. Mass. 1969).

"The teacher, particularly one at the outset of his career, is in the position of having invested in prepara-

[26] In affirming, the Seventh Circuit observed: "We think the district court properly considered the substantial adverse effects non-retention is likely to have upon the career interests of an individual professor . . ." (slip opin. at p. 4).

tion for a career which depends mainly on the willingness of public bodies to employ him. Such willingness, as the complaint alleges, is seriously dissipated if not destroyed when an early employer refuses to rehire the teacher." *Drown* v. *Portsmouth School District, supra,* 435 F.2d at 1184.

In view of the foregoing, it is not surprising to note that Sindermann has suffered this same fate. In the two years since his non-renewal Sindermann has applied to more than 100 colleges and universities, and has yet to receive an offer from one.[27] See also the fate of the teacher in *Orr* v. *Trinter,* No. 71-249, petition for certiorari, p. 4.

The foreseeable and actual consequences of what we have explained above is that the non-renewal of any teacher carries with it substantial likelihood of serious employability problems. The dilemma confronting the teacher is further compounded, as reflected by the instant case, because it is the nature of § 1983 actions that a teacher will seek relief *immediately* following notice of non-renewal at a time when the true magnitude of the teacher's unemployability is not yet provable.[28] The fact that this fate is predictable — albeit not provable at formative stages of the litigation — further buttresses strongly the contention that the adverse effect nonretention visits upon a teacher's ability to pursue his profession creates a sufficient interest to entitle him to *pre*-termination notice of the reasons for non-renewal and the opportunity for a hearing. The requirements of due process, as this Court has recognized in other circumstances where like consequences have been visited upon individuals, permit nothing less.

---

[27] This information is contained in an affidavit annexed to this brief (*infra, pp.* 9-14a.)

[28] Here, for example, the Court can only obtain such information from sources outside the record made in the district court.

(4) *Preserving Academic Freedom*

We have previously shown that where (as here) the State acknowledges that non-renewal has First Amendment implications, notice and a hearing are required. But few teachers terminated for their views will be blessed, as Sindermann was, with so candid an acknowledgment by their employer. The college bent upon eradicating from its faculty those with unpopular views, is far more likely to accomplish its end by unexplained non-renewals.

If teachers are not entitled to notice and hearing upon non-renewal, "academic freedom" will exist in name only. Few teachers will be bold enough to voice unpopular opinions, knowing that they can be denied renewal without explanation, and that they will receive neither notice nor a hearing in which to test the legitimacy of such action. The threat of such summary job loss inevitably must "cast a pall of orthodoxy over the classroom." *Keyishian* v. *Board of Regents, supra,* 385 U.S. at 603. It is "a highly effective *in terrorem* mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living . . ." *Id.* at 601.

The Constitution places an extremely high value upon academic freedom. *Id.* at 603:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . 'The vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American schools.' "

This Court has warned against State interference with "that free play of the spirit which all teachers ought especially to cultivate and practice." *Id.* at 601; *Wieman* v. *Updegraff, supra,* 344 U.S. at 195 (concurring opinion of Mr. Justice Frankfurter).

"The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools . . ." *Keyishian, supra,* 385 U.S. at 604. Plainly, as the Seventh Circuit has recently declared, teachers are entitled to notice and a hearing when non-renewal is contemplated, "as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." *Roth* v. *Board of Regents,* No. 18490 (7th Cir., July 1, 1971). See also Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439, 1453 (1968).

C. In the Usual Case (As Here) There Are No Overriding Governmental Interests Precluding Notice and a Hearing.

We have shown that teachers have interests at stake of such importance as to justify procedural due process when non-renewal is contemplated. It remains to determine whether those interests outweigh "the Governmental interest in summary adjudication." *Goldberg* v. *Kelly, supra,* 397 U.S. at 263.

One possible Governmental concern — that a hearing requirement would impose an unmanageable administrative burden — is clearly refuted by actual practices in this country. Almost all states provide "tenure" to those teachers who have taught in a school system for a specified number of years, affording them a statement of reasons and a hearing before their employment can be terminated at the end of a school year;[29] indeed, eleven states expressly provide these procedural protections to *all* primary and secondary

---

[29] As of October, 1970, teacher tenure laws were in effect on a state-wide basis in 39 states and the District of Columbia, and on a less than state-wide basis in six other states. NEA Research Bulletin, March 1971, pp. 17-18 (National Education Association).

school teachers, irrespective of whether they have tenure.[30] One of these eleven states is Texas. Thus, had Sindermann been a grade school teacher his right to a hearing would have been assured by statute. It can hardly be argued that administrative inconvenience precludes affording procedural due process to the much smaller number of teachers in higher education. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio,* 301 U.S. 292, 304-305 (1936); also, Cf. *Bell* v. *Burson, supra,* 402 U.S. at 540-541 and cases cited therein.

A second possible concern, the one most often voiced by the states, is that affording hearings will deprive states of the flexibility necessary to assure selection of the optimal teaching staff. This fear, we submit, is wholly imagined. Granting procedural rights to teachers does not narrow the *substantive* grounds upon which decision can be made. Teachers may be denied renewal for any reason whatsoever, except those substantively precluded by the federal Constitution or by state law. The states lose no flexibility because teachers must be told the reason and given an opportunity to be heard. To the extent such procedures force a state to articulate the reasons for not renewing a teacher, where it might otherwise have proceeded to nonrenew without a clear understanding of its own reasons, this can only be counted as a gain for the state as well as the

---

[30] Ten states provide notice and hearing to all teachers (whether or not tenured) by statute: Alaska, Arkansas, California, Connecticut, Iowa, Nevada, North Dakota, Rhode Island, Texas, and Washington Alaska Stat., tit. 14, ch. 20, § 180 (1966); Ark. Stat. Ann. § 80-1304(b), (Supp. 1969); Calif. Educ. Code § 13443 (West 1969); Conn. Gen. Stat. Ann. § 5-242 (Supp. 1969); Iowa Code Ann. § 279.13 (Supp. 1971); N.Dak. Code § 15-47-38 (Supp. 1969); R.I. Gen. Laws Ann. § 16-13-4 (1956); Texas Code Ann. § 21-204 (1969); Wash. Rev. Code Ann. § 28.67.070 (1964). In Maryland, the State Board of Education has decreed the same result by administrative decision. *Dietert* v. *Board of Education of Talbot County* (St. Board of Educ. May 26, 1971).

teacher: the state, after all, has an interest in assuring that its citizens are not the victims of arbitrary treatment at its hands. Cf. *Goldberg* v. *Kelly, supra,* 397 U.S. at 264-265. Likewise, the state will derive substantial benefit from this safety valve principle; it is assured that those teachers who are non-renewed are in fact individuals who have been demonstrated not to have satisfied the substantive standards for continued employment in the school system.

Finally, it has been argued that according procedural due process would destroy the distinction between tenured and non-tenured teachers. *Orr* v. *Trinter,* No. 20721 (6th Cir. June 16, 1971), petition for certiorari pending, No. 71-249. While it would be a sufficient answer that this distinction is not one of constitutional dimensions, and thus cannot stand in the way of constitutional rights, it happens not to be accurate. The essential distinction between tenured and non-tenured teachers is not in the procedures accorded to them, but in the substantive grounds for which they may be terminated. Whereas a non-tenured teacher may be terminated for any reason not offensive to the federal Constitution, state laws normally provide that the tenured teacher can lose his job only for severe misconduct, e.g. "for gross inefficiency or immorality; for willful and persistent violation of reasonable regulations of the board of education; or for other good and just cause."[31]

In sum, there is no "Governmental interest in summary adjudication" which outweights, in the usual case, the teacher's right to notice and hearing prior to non-renewal. Of course cases can be imagined which would be exceptions to this rule — a school administration is not required to leave an accused child molestor in the classroom while he is being accorded procedural due process. But in the routine case — as this one is — the balance clearly tips in favor of the teacher.

[31] Ohio Revised Code, Section 3319.16.

D. A Teacher Who Is Non-Renewed Without Notice and Hearing Is Entitled to Automatic Reinstatement and Back Pay, Without Consideration of Whether the Dismissal Was Substantively Justified.

In its opinion, the court below suggested (albeit it did not decide) that if it was ultimately determined that Sindermann had been denied procedural due process the remedy was to provide it to him now — i.e. to withhold a decision on the substantive issues until Sindermann was afforded an administrative hearing (A. 195-196). We submit that this is the wrong approach. If non-renewal was procedurally defective, because not preceded by notice and hearing, the appropriate remedy is reinstatement with back pay, without consideration of whether the non-renewal was substantively justified.[32]

Our position is that dictated by prior decisions of this Court. Repeatedly, this Court has recognized that a procedurally-defective decision must be "set aside" and the "slate" "wiped . . . clean," *Armstrong* v. *Manzo, supra,* 380 U.S. at 552, without consideration of the underlying substantive issues.

Two of these decisions have involved dismissals of public employees, in which the Court found procedural defects of a statutory (rather than constitutional) magnitude. In each, automatic reinstatement was the prescribed remedy. In *Vitarelli* v. *Seaton, supra,* a federal employee dismissed without adherence to procedures set forth in a government

---

[32] Indeed, in the instant circumstances provision of an administrative hearing would be even more difficult than is usually the case. In our view, the Employer can never sit as an impartial tribunal when called upon to resolve employer-employee conflicts. Moreover, even assuming that the Board of Regents might otherwise constitute an impartial tribunal to hear cases of this type, it could not be such here. For its impartiality is compromised, both because it has prejudged the case, Cf. *Goldberg* v. *Kelly, supra,* 397 U.S. at 271, and because Sindermann's actions were on issues where he opposed the Board's stated positions. See also *Pickering, supra,* 391 U.S. at 578, n. 2.

regulation was ordered reinstated *without consideration of whether the dismissal was substantively justified.* The Court explained (359 U.S. at 545, 546):

> "Because the proceedings attendant upon petitioner's dismissal from government service . . . . fell substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was *illegal and of no effect.*
>
> * * *
>
> "It follows from what we have said that *petitioner is entitled to the reinstatement which he seeks,* subject, of course, to any lawful exercise of the Secretary's authority *hereafter* to dismiss him from employment . . ." (emphasis added).

Similarly, *Greene* v. *United States, supra,* involved an employee of a private contractor whose security clearance was revoked by the Government in a procedurally defective manner, and who consequently lost his job. He sued for lost wages, under a Government regulation providing for restitution to private employees who are injured by wrongful revocations of security clearance. The Government resisted payment, arguing "that before restitution is allowed there must be a further showing . . . that the challenged revocation of access authorization was not only procedurally incorrect, but substantively wrong." (376 U.S. at 159). The Court rejected this argument, and awarded payment, explaining (376 U.S. at 161-162):

> "The . . . language [of the regulation] does not reasonably warrant the implication that a claimant, who has sustained the burden of demonstrating that the government acted without authority in revoking his clearance without a fair procedure, must take on the additional burden of showing at a later time that if he had been afforded fair procedures in the first

instance he would have been able to demonstrate successfully that he was entitled to access authorization. On the contrary, the regulation should be interpreted to mean that where a claimant establishes that the government has improperly denied clearance by its failure to provide fair procedures, the government is liable and petitioner is entitled to recover 'in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance.'

"In a case such as the present, where the Government has acted without authority in causing the discharge of an employee without providing adequate procedural safeguards, *we should be reluctant to conclude that a regulation, not explicitly so requiring, conditions restitution on a retrospective determination of the validity of the substantive reasons for the government action — reasons which the employee was not afforded an adequate opportunity to meet or rebut at the time of his discharge*" (emphasis added).

The policy considerations underpinning this remedy were elaborated in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 365, n. 18 (1963):

"The principle that a private association's failure to afford procedural safeguards may result in the imposition of damage liability *without inquiry into whether the association's action lacked substantive basis* is reflected in many state court decisions, resting on various theories of liability. [Citing numerous cases.] The precedents cited undoubtedly rest on a recognition that an according of fair procedures is of fundamental significance, that serious and irreversible economic injury may result from their denial . . . and that *a substantive inquiry after the fact cannot possibly succeed in accurately ascertaining retrospectively what*

the outcome would have been had the procedural safeguards been afforded in the first instance. The conditioning of relief for the procedural breach on a finding that a concomitant substantive breach occurred might well, therefore, result in an ultimate wrongful denial of recovery" (emphasis added).

Likewise, in *Greene* v. *Howard University,* 412 F.2d 1128 (D.C. Cir. 1969), the court, finding that teachers had been denied renewal without being accorded their *contractual* procedural rights, granted them backpay without permitting the university to prove that the discharges were substantively justified:

> "'The legal injury done by that failure [to provide a hearing] could not now be repaired by affording [the teachers] the hearing which they sought and were denied at the time their reappointments were withheld" (412 F.2d at 1135).

In several § 1983 cases, the district courts have ordered automatic reinstatement and back pay following a procedurally defective dismissal. In *Lucia* v. *Duggan,* 303 F.Supp. 112, 119 (D. Mass. 1969), the court reasoned:

> "Plaintiff is entitled to the benefits of his position as a teacher in the Monson Public Schools, including salary, *unless and until* he is *lawfully* separated from that position" (emphasis added).

Similarly, in *Olson* v. *Regents of University of Minnesota,* 301 F.Supp. 1355 (D. Minn. 1969) the court, expressing "no opinion on the merits of plaintiff's discharge" and making "no finding as to whether or not his dismissal was for a just cause," nevertheless ordered "that plaintiff be reinstated as a university employee with such reinstatement retroactive to the [date of dismissal] . . . This decision [does not] limit defendant from taking further action as to

plaintiff's dismissal in accordance with [due process]." See also *George* v. *Conneaut Board of Educ.*, Civ. Ac. No. C 70-398 (N.D. Ohio, Aug. 20, 1971), and *Patrone* v. *Howland Local Schools Board of Educ.*, Civ. Ac. No. C 70-819 (N.D. Ohio, Aug. 20, 1971).

In sum, if the failure to accord Sindermann a hearing was a denial of procedural due process, the appropriate remedy is reinstatement and back pay, and not simply affording him a hearing several years late.

IV. THE FEDERAL COURTS HAVE JURISDICTION OVER THIS ACTION

At no time throughout the course of this litigation have defendants challenged the existence of federal court jurisdiction over this action. Nevertheless, we feel compelled to say a few words about the subject, because this Court may raise the jurisdictional question *sua sponte*, and has a closely related jurisdictional question before it in *Lynch* v. *Household Finance Corporation*, No. 70-6356, probable jurisdiction noted, 39 L.W. 3375 (March 1, 1971).

42 U.S.C. § 1983 establishes that every person who, under color of state law, subjects another "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." 28 U.S.C. § 1343(3) vests the federal district courts with jurisdiction "to redress the deprivation, under color of any state law . . . of any right, privilege or immunity secured by the Constitution of the United States . . ."

On its face, 28 U.S.C. § 1343(3) would appear to grant federal jurisdiction over every allegation of violation of 42 U.S.C. § 1983, a conclusion which is strengthened by the knowledge that the provisions were adopted simul-

taneously, in the Civil Rights Act of 1871, 17 Stat. 13. Nevertheless, in a series of recent decisions, the Second Circuit has held that the jurisdictional scope of 28 U.S.C. § 1343(3) does not encompass all alleged violations of 42 U.S.C. § 1983 but, rather, only those which allege deprivations of "liberty" as distinguished from "property." *Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); *Tichon* v. *Harder*, 438 F.2d 1396 (2d Cir. 1971); *Lynch* v. *Household Finance Corp.*, 318 F.Supp. 1111 (D. Conn.) (Three-judge court), probable jurisdiction noted 39 L.W. 3375 (March 1, 1971); *Canty* v. *Board of Education*, No. 71-1312 (2d Cir., Sept. 3, 1971).

The Second Circuit's "liberty-property" distinction has not been adopted by any other court, and is inconsistent with this Court's decision in *Wisconsin* v. *Constantineau*, *supra*, 400 U.S. at 437-438 (1971), upholding jurisdiction under 28 U.S.C. § 1343(3) over a claim of damage to reputation (surely "property" rather than "liberty") visited under color of state law. For the reasons more fully set forth in the Brief for Appellants in *Lynch*, we submit that federal jurisdiction extends to all claims cognizable under 42 U.S.C. § 1983.[33]

In any event, the instant case is one which, even under the Second Circuit's formulation, falls on the "liberty" side of the ledger. The principal interest which Sindermann claims has been violated is his exercise of the rights protected by the First Amendment. Those are rights of

---

[33] Moreover, since the complaint in this case alleges actual damages far exceeding $10,000, federal jurisdiction also exists under 28 U.S.C. § 1331. The Second Circuit's "liberty-property" distinction was formulated in the belief that Congress did not want property claims of less than $10,000 adjudicated in the federal courts. *Eisen*, *supra*, 421 F.2d at 564, a concern wholly inapplicable to the instant case.

"liberty," as the Second Circuit recognized. *Eisen, supra,* 421 F.2d at 564, citing *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); see also *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503, 506 (1969); *Shelton* v. *Tucker, supra,* 364 U.S. at 484-485 (1960); *Wieman* v. *Updegraff, supra,* 344 U.S. at 196 (concurring opinion of Mr. Justice Frankfurter). Additionally, Sindermann contends that the defendants' actions will impair his ability to pursue his profession as a teacher, and "to pursue a calling of one's choice" is, the Second Circuit acknowledges, a "personal liberty." *Eisen, supra,* 421 F.2d at 565; *Tichon, supra,* 438 F.2d at 1401, 1402.[34]

CONCLUSION

For the reasons set forth hereinabove, this Court should affirm the Fifth Circuit's conclusions (1) that the absence of tenure or a contractual right to reemployment does not foreclose a suit alleging that non-renewal was visited for constitutionally impermissible reasons, and (2) that on the existing record summary judgment could not be granted in favor of defendants on this allegation.

With respect to the procedural due process issues, this Court should hold that Sindermann was unconstitutionally denied a hearing prior to non-renewal, and that the remedy

---

[34] In *Tichon,* the Second Circuit held that a probationary social worker who had no "reservoir of standing and reputation for skill, honesty and trust" could not contend that non-renewal impeded her "personal liberty" to pursue her calling. On this attenuated basis it distinguished its prior decision in *Birnbaum* v. *Trussell,* 371 F.2d 672 (2d Cir., 1966), upholding jurisdiction over a physician's claim that he was denied procedural due process when discharged without a hearing because of the impact upon his future employability. While we believe this distinction invalid, Sindermann meets the Second Circuit's test for jurisdiction: he had been employed as a teacher in the public colleges of Texas for ten years, and thus had the requisite "reservoir standing and reputation."

therefor should be reinstatement and back pay without consideration of whether the non-renewal was substantively justified.

Respectively submitted,

MICHAEL H. GOTTESMAN
GEORGE H. COHEN
DENNIS D. CLARK
BREDHOFF, BARR, GOTTESMAN,
COHEN & PEER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
WARREN BURNETT
RICHARD J. CLARKSON
BURNETT & CHILDS
P.O. Box 3707
Odessa, Texas 79760
Attorneys for Respondent

P.O. Box 818
Baytown, Texas

Robert Sindermann
President, T.J.C.T.A.
P.O. Box 3752
Odessa College
Odessa, Texas 79760

Dear Bob:

The hearing on our Academic Freedom and Tenure bill is set for April 23, in Austin. It is imperative that you as T.J.C.T.A. President and member of the Legislative Committee attend this hearing. The presidents of T.A.C.T. and A.A.U.P. will represent their organizations at the *Tenure Bill* hearing, so T.J.C.T.A. should exhibit equal interest.

If I can help you in any way do not hesitate to call me.

Respectfully,

DELTON GOODIN
Legislative Committee Chairman
T.J.C.T.A.

ODESSA COLLEGE

Founded in 1946

P.O. Box 3752
Odessa, Texas 79760

April 25, 1969

Mr. Bernhardt T. W. Sedate
Acting Chairman
Social Science Dept.
Odessa College

Dear Mr. Acting Chairman:

Although there is probably no need for this, in view of my request to you of April 9 last, and of my submission to Dr. Rodgers and Dean Chisum of supporting documents to justify my absence from this campus on two dates, April 23 and April 28, 1969, I want to officially notify you that I shall need to be in Austin on *Official* TEXAS JUNIOR COLLEGE TEACHERS ASSOCIATION business on Monday of next week, and will need to be substituted for. I will be glad to pay the substitutes, myself, at the going rate. As I understand it, you want to assign them. My classes Monday are at 9 a.m., Gov't. 232.2, WH111, Texas Legislative Process, and at 11 a.m., Gov't. 232.4, WH111, Texas Legislative Process, and at 2 p.m., Gov't. 232.7, DH205A, Texas Legislative Process. I have talked with various members of the Social Science staff, and several of them are available at each of these times. I will give names and times later in this epistle.

The supporting documents which I submitted, first to Dr. Rodgers in the original and then to Dean Chisum as Xerox reproductions, are:

(1) Reproduced letter from Senator Bill Moore, Chairman of the Senate State Affairs Committee, *inviting me to testify* before his committee on both SB512, Academic Freedom and Tenure for junior and

senior college teachers, scheduled to be heard on Wednesday, April 23, 1969 at 2 p.m. (postponed, and re-scheduled for 2 p.m. on Monday, April 28.) and on SB531, creating Permian State College, to be heard also on April 28 before the State Affairs Committee at 2 p.m.

(2) Reproduced letter from State Sen. Oscar Mauzy, sponsor of our Academic Freedom and Tenure bill in the Senate, expressing the hope that I would be there to testify on SB512 when it is heard by the State Affairs Committee.

(3) Reproduced letter from Prof. Delton Goodin Chairman, Legislative Committee, TJCTA, stating that it is *imperative* that I be there to testify when SB512 is heard, in the name of our teachers' organization.

Dr. Rodgers suggested that I should have the Chairman of our TJCTA Legislative Committee, Prof. Delton Goodin, represent our organization before the State Affairs Committee. This proved to be impossible. Chairman Goodin also will be unavailable to testify on Monday, April 28, owing to the necessity to take his three children to the doctors' office or hospital for tonsillectomies. If I do not testify, no one from our organization will, and it is *our* bill.

(4) Reproduced letter from Prof. Colfrey Connally, State President, Texas Conference, AAUP, which appoints me to a position on Committee "A" of the Texas AAUP, which is the committee which investigates complaints from college teachers regarding violations of Academic Freedom and Tenure. I accepted the position, of course.

As I indicated to both Dr. Rodgers, orally, and to Dean Chisum in a letter the same day, I regard this invitation to testify from an esteemed member of the Texas Legislature

as something not to be lightly dismissed or refused, in the interest of good relations with the Texas Legislature on behalf of our teachers association as well as possibly for this college. I am obliged to go, as an official obligation of my office in TJCTA.

I am notifying you today, Mr. Acting Chairman, that I will be following through on that invitation from Sen. Moore, on Monday, April 28, 1969, as the Dean and Dr. Rodgers were officially put on notice previously by the display of Sen. Moore's letter to both men.

I have endeavored to follow what is standard practice for our other TJCTA Legislative Committee members; especially Chairman Goodin and Dean Johnson, of Lee College, to arrange for one's own substitutes when one must go to official duty in Austin, but have found that those who substituted for me last Wednesday have been intimidated by you so that they are willing but reluctant to substitute for me next Monday. Needless to say, I do not appreciate this, and trust that such will *not* be the case on Monday next, when I shall again be absent and will need substitution. I shall be missing my classes for only the third time this school year, and it is very much in line with my official duties as state TJCTA President.

Perhaps some college administrators are not aware of what we were elected for, at the TJCTA convention in Fort Worth in February. The whole purpose of wiping out the old leadership of TJCTA was to make a *professional organization* out of TJCTA; something which it has *never* been. Many of us junior college teachers were thoroughly disgusted with TJCTA, as was Dr. James Reynolds, and we were resolved that the organization had to be either disbanded, or it had to be improved. We chose to take the more responsible path, to reorganize the whole structure and mode of operation of TJCTA, by taking the reins of leadership and re-directing it along *professional* lines.

As any political or educational realist of the state knows, the *major* effort at improving the professional status of any group or organization in Texas *must* be made in Austin, in the Texas Legislature. As both our State Representative, Ace Pickens, and our State Senator, Pete Snelson, have told me, *no one* has ever approached the Texas Legislature in the interest of the Junior College Teachers of Texas. They have also plainly admitted that "the wheel that squeaks the loudest down here gets the most grease." Thus far, in the long history of the junior college movement in Texas, *no one,* to my knowledge, has ever gone to bat specifically for the interests of the junior college teachers in this state, before the Legislature. This, we are determined to do, come hell or high water. The leadership of TJCTA is going to let the Texas Legislature know, in a sound, intelligent, sensible manner, that we junior college teachers exist, and that we have an association that is interested in our well-being, by lobbying activities in Austin. I was elected to "get this organization moving," and I fully intend to do just that. No previous TJCTA President, to my knowledge, ever appeared before the Texas Legislature on behalf of his fellow teachers. I am the first to do this, but not the last. This failure on the part of previous leaders of this organization is one of the things handicapping the advancement of the professional interests of junior college teachers in Texas. The failure is understandable, because most of the previous leaders were teachers of Business Administration, Math, English, etc., with no grasp of the realities of Texas higher education, and of the fact that it is all wrapped up in politics. As some of us know only too well, higher education in Texas is basically dependent upon political maneuvering, for better or worse. Those who "politick" best down in Austin get what they want, in the field of higher education. So, in order for our organization to be at all effective, a major lobbying and legislative approach is *vital.* If we are denied that opportunity to represent effectively our own in-

terests in Austin, we are being denied any hope of advancing this profession. Administrators *cannot* be expected to adequately represent the interests of teachers on all issues. This current division over our Academic Freedom and Tenure bill is a clear example of that fact. Apparently, this is not as crucial a problem to some as it is to us classroom teachers.

The second part of our professionalization thrust is in the area of Professional Development. Here, we intend to make our general, business, and section meetings of TJCTA far more meaningful than they have ever been in the past, for most of us. We are going to encourage the selection of better-caliber speakers, rather than tired college presidents and humorous (?) dentists from San Marcos, fresh from the Knife and Fork Club circuit. I am acquainted with the Ass't. U. S. Commissioner of Education, and plan to invite him to speak, as well as people in the Austin area of the stature of Walt Rostow or the former President, himself. We are also going to have professional papers delivered at section meetings, and will publish them in the *Messenger,* making that mazaine worth reading for the *first* time.

As you can readily see, the new leadership of TJCTA has an ambitious program before it, and we must move quickly to effect it, as we have only this year, for sure, to prove that we are equal to the challenge we posed for ourselves by ousting the old leaders. I cannot understand or appreciate any administrators who would not want to assist and support us in this effort, unless they do not want to see junior college teachers emerge as true *professionals.* Our first major effort, obviously, has to be directed to the Legislature in AUSTIN, while the boys are in session. Then, after the boys have adjourned, we will turn our leadership efforts to beefing up the professional development aspects of our operation. We hope to have the cooperation of college administrators in what we are doing. If

we do, a great deal can be accomplished which will benefit administrators as well as teachers.

So, in sum, I am officially requesting you, as my *Acting* Chairman, to assign substitutes in my classes scheduled for next Monday, while I am in Austin on official TJCTA business. I will reimburse them, and no cost whatever to the college is involved. The following people are off duty at the following times: 9 a.m., Gov't. 232.2—WH111 Frank Cornes; Dick Kennedy; 11 a.m., Gov't. 232.4—Dave Yedding; 2 p.m., Gov't 232.7, Dick Kennedy. Helen Kennedy is also available at all of those times to substitute. I see no reason why substitutes cannot be assigned, since they are both available and willing. I have informed each of them as to what point in the course we are discussing, but for some strange reason they seem to feel that they will be jeopardizing their future positions at this college, if they "volunteer" their services without the request coming from you. I trust that this "strange reason" will either resolve itself over this week-end, before Monday, or that you will see fit to ask these people to substitute for me. I DON'T BELIEVE THEY WOULD BE JEOPARDIZING THEIR FUTURE HERE AT ODESSA COLLEGE, BY SUBSTITUTING FOR ME MONDAY, DO YOU?

Sincerely yours,

ROBERT SINDERMANN
President, Texas Junior College
Teachers Association, 1969-70.
Lecturer in Government,
Social Science Dept.,
Odessa College

May 21, 1969

Dr. Jack Rodgers, President
Odessa College
P.O. Box 3752
Odessa, Texas 79760

Dear Dr. Rodgers:

Thank you for your letter of May 19, 1969, notifying me that the Board, upon your recommendation, had voted not to renew my contract with Odessa College for the next school year, 1969-70, at the May 6, 1969 meeting of the Board. In response to this, I would like to formally request that both you and the Board of Regents reconsider this action, and not terminate my contractual relationship with Odessa College without first following all of the procedures recommended by the Coordinating Board, College and University System, for teacher dismissal cases. These aforementioned procedures include a meeting with the college administrators at which I am informed of the charges against me, followed by a hearing before a committee of faculty members, to be followed (if charges are sustained at this proceeding) by a hearing before the Board of Regents; said hearing to be conducted in public, and with my full right to advice of counsel of my own choosing to be respected.

I should appreciate hearing from you in response to this request, at your earliest opportunity.

Very truly yours,

ROBERT SINDERMANN
1202 E. 51st St.
Odessa, Texas 79760

AFFIDAVIT

September 14, 1971
8503 Jamestown Drive
Austin, Texas 78758

To Whom It May Concern:

I, Robert Paul Sindermann, of 8503 Jamestown Drive, Austin, Texas, do solemnly hereby attest that I made application in good faith to all of the institutions of higher education listed on the attached sheets, following the termination of my teaching contract at Odessa College in May, 1969, and that I was not offered a teaching contract by any of the herein-named institutions, during these past two years and three months.

I have sought in vain to regain my position in the academic world, where I had some ten years' college-level teaching experience and the rank of Lecturer (A.B.D.) at the time of dismissal by Odessa College. I hereby attest that it is my firm belief that the cause of my lack of success in locating a position; especially in the case of the junior colleges, is the lawsuit that I have been involved in since May, 1969, with Odessa College officials.

Sworn this date

ROBERT PAUL SINDERMANN
8503 Jamestown Drive
Austin, Texas 78758

BARBARA CEARLEY

A. *Colleges Applied to in 1969:*

Alvin Junior College, Alvin, Texas
Amarillo College, Amarillo, Texas
Angelina College, Lufkin, Texas
Angelo State University, San Angelo, Texas

Annunciation College, Victoria, Texas
Arlington State College (University of Texas at Arlington), Arlington, Texas
Bee County College, Beeville, Texas
Blinn College, Brenham, Texas
Borger Junior College, Borger, Texas (Frank Phillips College)
Brazosport Junior College, Freeport, Texas
Brownsville Junior College (Texas Southmost College, Brownsville, Texas)
Central Texas College, Killeen, Texas
Cisco Junior College, Cisco, Texas
Clarendon Junior College, Clarendon, Texas
College of the Mainland, Texas City, Texas
Concordia Lutheran College, Austin, Texas
Cooke County Junior College, Gainesville, Texas
Del Mar College, Corpus Christi, Texas
El Centro College, Dallas, Texas
Ft. Worth Christian College, Ft. Worth, Texas
Galveston Community College, Galveston, Texas
Grayson County Junior College, Denison, Texas
Gulf Coast Bible College, Houston, Texas
Henderson County Junior College, Athens, Texas
Hill Junior College, Hillsboro, Texas
Howard County Junior College, Big Spring, Texas
Incarnate Word College, San Antonio, Texas
Kilgore Junior College, Kilgore, Texas
Lamar State College of Technology, Beaumont, Texas
Laredo Junior College, Laredo, Texas
Lee College, Baytown, Texas
Lubbock Christian College, Lubbock, Texas
McLennan Community College, Waco, Texas
Midwestern University, Wichita Falls, Texas
Navarro Junior College, Corsicana, Texas
Pan American College, Edinburg, Texas
Panola Junior College, Carthage, Texas

Paris Junior College, Paris, Texas
Ranger Junior College, Ranger, Texas
St. Edwards University, Austin, Texas
St. Phillips College, San Antonio, Texas
San Antonio College, San Antonio, Texas
San Jacinto Junior College, Pasadena, Texas
Schreiner Institute, Kerrville, Texas
South Plains College, Leveland, Texas
South Texas Junior College, Houston, Texas
Southwestern Assemblies of God College, Waxahachie, Texas
Southwestern Christian College, Terrell, Texas
Southwestern University, Georgetown, Texas
Southwest Texas Junior College, Uvalde, Texas
Southwest Texas State University, San Marcos, Texas
Stephen F. Austin State University, Nacogdoches, Texas
Sul Ross State University, Alpine, Texas
Tarleton State College, Stephenville, Texas
Tarrant County Junior College, Ft. Worth, Texas
Temple Junior College, Temple, Texas
Texarkana College, Texarkana, Texas
Texas Christian University, Ft. Worth, Texas
Texas College, Tyler, Texas
Texas Lutheran College, Seguin, Texas
Texas Technological College, Lubbock, Texas
Tyler Junior College, Tyler, Texas
Victoria College, Victoria, Texas
Weatherford College, Weatherford, Texas
Wharton County Junior College, Wharton, Texas

Plus about ten out-of-state four-year institutions whose names escape me.

B. *Colleges Applied to in 1970:*

American University, Washington, D.C.
Antioch College, Antioch, Ohio
Catholic University, Washington, D.C.

George Washington University, Washington, D.C.
Georgetown University, Washington, D.C.
Howard University, Washington, D.C.
University of Maryland, College Park, Maryland
Marjorie Webster Junior College, Washington, D.C.
Northern Virginia Community College, Annandale, Virginia
Johns Hopkins University, Baltimore, Maryland
University of Texas of the Permian Basin, Odessa, Texas
Saginaw Vallege College, University Center, Michigan

C. *Colleges Applied to in 1971:*

Montgomery College, Rockville, Maryland (See attached explanatory note)
Antioch College, Yellow Springs, Ohio
University of Dayton, Dayton, Ohio
Depauw University, Greencastle, Indiana
University of North Carolina, Chapel Hill, North Carolina
Saint Francis College, Biddeford, Maine
University of Southern California, Los Angeles, California
Institute of Suburban Affairs, Inc., Manhasset, New York
Grand Valley State College, Allendale, Michigan
Universal Reference System, Princeton, New Jersey
Kutztown State College, Kutztown, Pennsylvania
Villa Julie College, Stevenson, Maryland
West Virginia University, Morgantown, West Virginia
Windham College, Putney, Vermont
Prairie View A&M College, Prairie View, Texas
Albion College, Albion, Michigan
Trenton State College, Trenton, New Jersey

The most serious consideration that I have received for a position in the academic world was given me this year by Montgomery Junior College, Rockville, Maryland. I began negotiating with this college in March, 1971, while still in Washington, D.C. In May, I was flown up to Maryland for an interview at college expense. I was told by the Depart-

ment Chairman, Mrs. Lomax, that I was the one they had selected out of a field of 125 applicants to teach for them this fall. I bargained hard for a decent salary to meet the high cost of living in the Washington area, and the college officials met my demands.

The Dean, Mr. Wayne Hoof, negotiated with me throughout the summer, indicating the need to clear my appointment with the President, who was off on vacation, and the Board, which was not meeting during the summer months. I was assured by both the Department Chairman and the Dean that they would consider me on my merits as a teacher, without regard to my pending lawsuit situation. After negotiations had progressed fairly well, and *almost* to the contract-offering stage, the U.S. Supreme Court announced that it would hear my case during the coming fall term. This changed things, for Montgomery College. They became concerned about publicity surrounding a possible decision during this school year by the High Court. It became imperative now for the President to discuss my appointment with the Academic Dean, and with the Board members. The Dean finally suggested a temporary, one-year appointment to me, and I agreed, to clear away the "red tape." In the final analysis, it became impossible for the college officials to clear my appointment with the President and Board members in time for me to start the fall semester teaching at Montgomery College. The Social Science Department Chairman and members remained firm in their recommendation that it be me or no one, so no one was hired to fill the vacancy, and they will now have to recruit part-time instructors to fill the gap. I am still under possible consideration, I believe, for next February (probably not feasible; in terms of moving my family at mid-year, or taking up teaching duties at mid-year), or for the fall of 1972. They are very obviously leery of me, until my court case is finally resolved, one way or the other.

This was my best opportunity of a teaching job since I was released at Odessa College in June, 1969, and this experience leads me to believe that it is now pointless for me to apply for a teaching job anywhere in the United States, for every college will want to know all about my court suit, as Montgomery College officials did, and they will shy away, not wanting to hire me, until my situation is finally resolved. They may talk a good game, as Montgomery College did, but in the final analysis they will chicken out. I cannot re-enter the teaching profession until the courts act.

ELEVATE ODESSA COLLEGE

A MEANINGLESS BATTLE OVER SITE?

(SEE CHAMBER OF COMMERCE AD IN ODESSA AMERICAN 3-1-69)

Thank You Chamber of Commerce College Committee!

YOU EXPLAINED YOUR POSITION PERFECTLY FOR ECTOR AND MIDLAND COUNTY CITIZENS!

YOU SAY YOU WORKED FOR 10 YEARS TO BRING HIGHER EDUCATION TO ODESSA?

THE REST OF US HAVE WORKED (AND PAID) FOR 23 YEARS

We Have Followed Your Leadership To The Brink Of Total Unconditional Surrender

HERE WE DRAW THE LINE

NOW WHAT COULD HAVE UPSET HIM?

THIS AD IS COSTING US SOMETHING OVER $400.00, AND THE MONEY COMES IN SMALL AMOUNTS FROM MANY PEOPLE. USUALLY, THE PEOPLE DON'T HAVE TO BUY ADS TO SAY THEY ARE FOR THEIR CITY, BUT OUR NEWSPAPER IS STILL ON THE FENCE, AND IT MAY NEVER MOVE OFF, SO WE THOUGHT WE HAD TO SPEND THE MONEY.

IF YOU DID NOT READ THE CHAMBER OF COMMERCE AD IN LAST SATURDAY'S ODESSA AMERICAN, WE URGE YOU AS A MATTER OF PUBLIC SERVICE TO READ IT AT ONCE. WE DON'T WANT ANYONE TO MISS IT!

The ad implies that Odessans who support elevation of Odessa

16a

Appendix

"Me No Sealy Dealy"

believe our Legislature should take the lead for private interest groups who now claim to speak for them.

Chamber officials in their ad imply we are not BIG enough, WISE enough, and UNSELFISH enough to have a four - year school in Odessa.

Apparently Midland people have all of these virtues that Odessans lack, if we are to believe the Chamber propaganda line, since our Chamber officials endorse an upper level institution for that county.

They take this position despite the fact that Midland citizens once let a college die, and twice refused to help Odessa College live.

WE SORT OF THINK THAT THE PLACE THAT HAS WATCHED OVER THE ONLY JUNIOR COLLEGE AROUND, THE PLACE THAT HAS HAD NO HELP WITH THE TAX LOAD, THE PLACE THAT HAS BUILT ITS JUNIOR COLLEGE INTO ONE OF THE FINEST, AND THE PLACE THAT HAS BEEN PROMISED A SENIOR COLLEGE BY EVERY AREA LEGISLATOR FOR THE PAST TEN YEARS, MIGHT OUGHT TO BE A PRETTY SAFE PLACE FOR A COLLEGE. WHAT DO YOU THINK?

During the last Senate race Senator Snelson and then Senator Hardeman fought it out in our county along the lines of which could do the most to elevate Odessa College. Representatives Pickens and Slack likewise have repeatedly promised the elevation of Odessa College. These are decent men, and men who will not go back on their word. Our Chamber of Commerce Educational Committee has sabotaged them, and is now pressuring them to go back on their word. They want your support. All three of them say that they did not want our Chamber of Commerce to get in this position. Please write them and let them know where you stand.

PRESENTED IN THE INTEREST OF LONG SUFFERING, BUT NO LONGER GULLIBLE, TAXPAYERS — BY THE COMMITTEE TO KEEP ODESSA COLLEGE IN ODESSA

Mrs. Murray H. Fly
Robert Sindermann
Chunky Hendrick
Mike Earney
Mrs. D. T. Osborn
Mrs. Otis Geers
Warren Burnett
Ernest Shelton

Mrs. Robert Dooley
Mrs. Palmer Ramsey
Mrs. Hugh Weathersby
C. A. Noll
Mrs. Betty Pyle
Frank Spaulding
Mrs. Henry Pegues
Mrs. C. A. Noll

Mrs. D. W. Owens
P. C. Ramsey
Mrs. Bill Bently
Mrs. Steve Cozby
Bessye Cowden Ward
Mrs. Tom McKnight
Mrs. Harold Young
Josh H. Parr

Palmer Ramsey
Earl Frahcell
Norman Maney
Mrs. Don Clemmer
Bill Bently
Mrs. Paul Collum
Mrs. Warren Burnett
Robert Dooley

(Paid Pol. Ad. by Committee To Keep Odessa College in Odessa)

FILE COPY

FILED
SEP 30 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-36

CHARLES R. PERRY, *et al.*,

v.

ROBERT P. SINDERMANN

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT.

HERMAN I. ORENTLICHER
1 Dupont Circle, N.W., Suite 500
Washington, D. C. 20036

WILLIAM W. VAN ALSTYNE
Duke University
School of Law
Durham, North Carolina 27706
Attorneys for Amicus Curiae

Of Counsel:

ROBERT M. O'NEIL
University of California School of Law
Berkeley, California 94720

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Interest of *Amicus Curiae*	2
Summary of Argument	10
Argument	11
I. The judgment of the Court of Appeals was clearly correct under the special circumstances of this case	11
II. The constitutional rights and liberties of nontenured faculty members depend for adequate protection upon procedural safeguards	18
A. The interest or status of the nontenured college teacher merits constitutional protection	19
B. This Court has recognized substantive constitutional rights of public employees generally, and faculty specifically, without regard to the claimant's status under state or local law	23
C. The substantive constitutional and academic freedom interests of nontenured faculty would be gravely jeopardized without procedural safeguards for nonrenewal	26
D. A balancing of relevant interests of individual and institution justifies procedural safeguards for nontenured faculty	28
Conclusion	36
Appendix	
A. 1940 Statement of Principles on Academic Freedom and Tenure and Interpretive Comments	37
B. 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings	49
C. 1971 Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments	56

TABLE OF AUTHORITIES

CASES: Page

Adler v. Board of Education, 342 U.S. 485 (1952) 17
Baggett v. Bullitt, 377 U.S. 360 (1964) 24
Beilan v. Board of Education, 357 U.S. 399 (1958) 15
Bell v. Burson, 402 U.S. 535 (1971) 14, 19
Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 17, 28
Connell v. Higginbotham, 403 U.S. 207 (1971) 16, 24
Cooper v. Aaron, 358 U.S. 1 (1958) 35
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) 24
Drown v. Portsmouth School District, 435 F.2d 1182 (1st Cir. 1969) 20, 30, 33
Edward v. South Carolina, 372 U.S. 229 (1963) 12
Elfbrandt v. Russell, 384 U.S. 11 (1966) 24
Freeman v. Gould Special District of Lincoln County, 405 F.2d 1153 (8th Cir, 1969) 20
Goldberg v. Kelly, 397 U.S. 254 (1970) 17, 19, 28, 29
Hannah v. Larche, 363 U.S. 420 (1960) 28
Hetrick v. Martin, 322 F. Supp. 545 (E.D. Ky. 1971) .. 25
Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969) 9, 20
Keyishian v. Board of Regents, 385 U.S. 589 (1967) ..19, 23
Lerner v. Casey, 357 U.S. 468 (1958) 15
McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) .. 24
Nelson v. County of Los Angeles, 362 U.S. 1 (1960) ..15, 25
Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) 24
Pickering v. Board of Education, 391 U.S. 563 (1968) 12, 16, 24
Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969) 20
Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wisc. 1970), aff'd — F.2d — (7th Cir. 1971) 20, 26
Service v. Dulles, 354 U.S. 363 (1957) 14
Shelton v. Tucker, 364 U.S. 479 (1960) 19, 24
Sherbert v. Verner, 374 U.S. 398 (1963) 19, 25
Slochower v. Board of Higher Education, 350 U.S. 551 (1956) 15, 16
Speiser v. Randall, 357 U.S. 513 (1958) 25
Vitarelli v. Seaton, 359 U.S. 535 (1959) 13, 14
Whitehill v. Elkins, 389 U.S. 54 (1967) 16, 24
Yellin v. United States, 374 U.S. 109 (1963) 14

Page

CONSTITUTION OF THE UNITED STATES:

First Amendment 12, 13, 17, 20, 22, 23

Fourteenth Amendment 22

OTHER AUTHORITIES AND REFERENCES:

Statements of Academic Standards on Academic Freedom, Tenure, and Related Matters

1940 Statement of Principles on Academic Freedom and Tenure and Interpretive Comments, 46 AAUP Bull. 323 (1970) (reprinted in Appendix to Brief) 2, 3, 4, 12

1956 Statement on Academic Freedom and Tenure in the Quest for National Security, 42 AAUP Bull. 50 (1956) 5

1958 Statement on Procedural Standards in Faculty Dismissal Proceedings, 54 AAUP Bull. 439 (1968) (reprinted in Appendix to Brief).. 3

1964 Statement on Standards for Notice of Nonappointment, 53 AAUP Bull. 407 (1967) 7

1966 Statement on Government of Colleges and Universities, 52 AAUP Bull. 375 (1966) 7, 12

1968 Recommended Institutional Regulations on Academic Freedom and Tenure, 54 AAUP Bull. 448 (1968) 4

1971 Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, 57 AAUP Bull. 206 (1971) (reprinted in Appendix to Brief) 8, 9, 29ff

Joughin, Louis, ed., Academic Freedom and Tenure (1969 edition) 4

Van Alstyne, William W., The Constitutional Rights of Teachers and Professors, 1970 Duke L. J. 841..23, 28

Van Alstyne, William W., The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-36

CHARLES R. PERRY, *et al.*,

v.

ROBERT P. SINDERMANN

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT.

The American Association of University Professors appears *amicus curiae*, with consent of all parties, in support of respondent.

INTEREST OF AMICUS CURIAE

The American Association of University Professors (the "AAUP"), founded in 1915, is the national professional organization consisting exclusively of teachers and research scholars in all disciplines at accredited colleges and universities throughout the United States. The Association includes over 1275 chapters and has more than 90,000 members. It is estimated that such members comprise approximately 30% of the full time teaching faculty of accredited institutions of higher learning.

From its founding, the Association has been fundamentally committed to the protection of academic freedom. That commitment involves not only a concern for substantive rights and liberties of faculty members, but also for the procedures used in termination of academic appointments. On various occasions, through statements of general applicability and investigation of particular personnel matters, the Association has declared this concern for fair and adequate procedures. It has consistently asserted that academic freedom cannot flourish unless such procedures are observed by college and university officials and governing boards.

Early Association statements focused primarily upon procedures appropriate to the termination of faculty appointments through dismissal action. Thus, broad procedural, as well as substantive, guidelines protective of tenure as a principal safeguard of academic freedom were contained in the 1940 *Statement of Principles on Academic Freedom and Tenure* (the "1940 *Statement*"), a policy statement which in the past three decades has received the endorsement of some 80-odd professional and educational organizations and societies. Especial attention was given to the matter of

procedures in a 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings,* which, like the 1940 *Statement,* was jointly formulated by AAUP and the Association of American Colleges. Both *Statements* are found in the Appendix to this Brief.

An underlying principle of the procedures developed in these two *Statements,* commonly referred to as academic due process, is that tenure can perform its intended function only if it carries with it protection—or perhaps more accurately assurance of protection—against dismissal except (i) for reasons related directly and substantially to the fitness of the faculty member in his professional capacity as a teacher or researcher ("cause" or "adequate cause"), (ii) duly established by procedures reflecting basic concepts of due process as they have developed in our sense of a free society. The 1940 *Statement* likewise reflects as basic principle that if academic freedom is to obtain, it must apply to *all* faculty members. Accordingly, both the 1940 and 1958 *Statements* provide that dismissal of nontenured teachers prior to the expiration of their term appointments also should be based on cause and subject to the procedural safeguards applicable to tenured faculty. In general, during the major part of the first two decades following the formulation of the 1940 *Statement,* the matter of nonrenewal of academic term appointments was essentially handled through institutionally developed standards. In some instances, they were simply subsumed under general grievance procedures; in still others there were no procedures available, specific or general.

The contours of academic due process, and of academic freedom itself in its substantive aspects, have been increasingly refined and sensitized as experience

has developed under the 1940 *Statement*. On the basis of the felt need reflected in such experience, the termination, through nonrenewal of appointment, of probationary or other nontenured faculty became an explicit focus of AAUP concern in 1957, when the Association's Committee A on Academic Freedom and Tenure developed general standards which would provide adequate procedural safeguards against nonrenewal caused by considerations directly violative of academic freedom. As so developed, these standards made available an appropriate hearing process for such cases. In appreciation of the distinction between tenure and nontenure status, and of the more complex countervailing interests presented in the latter case, these procedures provided as a prerequisite to a hearing (i) that there be preliminary consideration by a faculty committee of the teacher's allegations and for its recommendation as to the appropriateness of a full scale hearing, and (ii) that the burden of proof be on the faculty member that the nonrenewal was in fact based on considerations violative of academic freedom. Joughin, ed., *Academic Freedom and Tenure* (1969 ed.) 75; see also 1968 *Recommended Institutional Regulations on Academic Freedom and Tenure*, sec. 10, 54 AAUP *Bull.* 448, 451 (1968). *Cf. Appendix, pp. 66-68.*

Concurrently with the recognition in the 1940 *Statement*, and subsequent pronouncements of policy, that the principles and application of academic due process cannot be limited to termination of tenure appointments, policy statements and position have traditionally reiterated that "the free search for truth and its free exposition" has a perimeter larger than teaching in the classroom itself or research in the university library or laboratory. The 1940 *Statement* itself in

specifying the ends to which tenure is a means, speaks in terms of "freedom of teaching and research and of extramural activities". It stresses that the "college or university teacher is a citizen" and that "[w]hen he speaks or writes as a citizen, he should be free from institutional censorship or discipline. . . ." See 1940 *Statement, Third Paragraph, Academic Freedom* (c), and *Interpretation 3*. (Appendix, pp. 40, 41; 43); see especially Interpretive Comments, (Appendix, pp. 45, 46). In a more developed statement formulated in 1956 on *Academic Freedom and Tenure in the Quest for National Security*, the AAUP pointed to the fact that:

> The maintenance of freedom of speech, publication, religion, and assembly (each of which is a component of intellectual freedom) is the breath of life of a democratic society. The need is greatest in fields of higher learning, where the use of reason and the cultivation of the highest forms of human expression are the basic methods. To an increasing extent, society has come to rely upon colleges and universities as a principal means of acquiring new knowledge and new techniques, of conveying the fruits of past and present learning to the community, and of transmitting these results to generations to come. Without freedom to explore, to criticize existing institutions, to exchange ideas, and to advocate solutions to human problems, faculty members and students cannot perform their work, cannot maintain their self-respect. Society suffers correspondingly. The liberty that is needed requires a freedom of thought and expression within colleges and universities, a freedom to carry the results of honest inquiry to the outside, and a freedom to influence human affairs in the same manner as other informed and unprejudiced persons do. * * *

The demand we of the academic world make for academic freedom is not made primarily for our own benefit. We enjoy the exercise of freedom; but the purposes of liberty lie in a democracy, in the common welfare. It has recently been said, "With regard to some occupations, it is eminently in the interest of society that the men concerned speak their minds without fear of retribution. . . . The occupational work of the vast majority of people is largely independent of their thought and speech. The professor's work *consists* of his thought and speech. If he loses his position for what he writes or says, he will, as a rule, have to leave his profession, and may no longer be able effectively to question and challenge accepted doctrines or effectively to defend challenged doctrines. And if *some* professors lose their positions for what they write or say, the effect on many other professors will be such that their usefulness to their students and to society will be gravely reduced."[1]

We ask, then, for the maintenance of academic freedom and of the civil liberties of scholars, not as a special right, but as a means whereby we may make our appointed contribution to the life of the commonwealth and share equitably, but not more than equitably, in the American heritage. Society has the power to destroy or impair this freedom; but it cannot do so and retain the values of self-criticism and originality fostered by higher education. (42 AAUP *Bull.* 49, 54-55 (1956)).

A reflection of the pervasive interrelationships of the various aspects and features of academic life and

---

[1] Fritz Machlup, "On Some Misconceptions Concerning Academic Freedom," [41 AAUP Bull. 753 (1955)].

civil liberties of scholars, in direct relevance to the facts of the instant case, is contained in a joint formulation in 1966 by the AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges, of a statement of principles on the separate subject of college and university government. After pointing out that "Anyone [associated with an institution] affects the institution when he speaks of it in public," the formulation immediately stressed that "The right of a board member, an administrative officer, a faculty member, or a student to speak on general educational questions or about the administration and operations of his own institution is a part of his right as a citizen and should not be abridged by the institution." 1966 *Statement on Government of Colleges and Universities,* 52 AAUP *Bull.* 375, 377 (1966).

General standards as to nonrenewal of probationary or other nontenured appointments again became an explicit focus of Association concern in 1964. Its Annual Meeting in that year adopted recommended policies in two pertinent areas: *First*, the date or time by which a probationary teacher should receive notice of an administration intent not to renew a contract for the following year; and *second*, the form in which such notice should be conveyed (*i.e.*, in writing). These recommendations exemplified an underlying Association position on the status of probationary faculty: "Because a probationary appointment, even though for a fixed or stated term, carries an expectation of renewal, the faculty member should be explicitly informed of a decision not to renew his appointment, in order that he may seek a position at another col-

lege or university." *Standards for Notice of Nonreappointment*, 53 AAUP *Bull.* 407 (1967); *cf. the Nonrenewal Statement,* Appendix, pp. 58, 59; see also Appendix pp. 47, 48. The recommendations thus reflected current conditions and expectations of academic life together with the Association's own particular sensitivity for academic freedom. They assure further that a faculty member who has reason to believe that the nonrenewal is in violation of his academic freedom, other constitutional rights, or academic standards, has in fact time to use established procedures before the non-renewal becomes a *fait accompli.*

Three years later, the Association's Committee A on Academic Freedom and Tenure drafted a proposed *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* (the *"Nonrenewal Statement"*). The concern for procedures appropriate to probationary appointments was now made comprehensive and exclusive for the first time. Publication of this proposed Statement in the Spring, 1970, issue of the *AAUP Bulletin* (the Association's official organ) elicited many comments. Only minor modifications proved necessary in the language and format of the Statement. In this revised form, the Statement (set forth in the Appendix to this Brief) was adopted by the Council and endorsed by the Fifty-seventh Annual Meeting as Association policy, in April, 1971.

The essentials of the 1971 Statement may be summarized briefly here since they are pertinent to the position *amicus curiae* takes in the present litigation. In addition to reiterating the standards previously developed where issues of academic freedom violation are directly involved, the Statement provides that

every nontenured faculty member should (a) be advised of the substantive and procedural *standards* employed in decisions affecting renewal and tenure; (b) be advised of the *time* when such decisions are customarily made—with an opportunity to submit material relevant to his candidacy; (c) receive timely *notice in writing* of a decision not to renew or reappoint, and—*if* the faculty member himself so requests—a *statement of the reasons* (in writing if he so desires) underlying that decision; and (d) have an opportunity to request reconsideration of an adverse judgment by the decision making body. The Statement does not provide for the right *per se* to an adversary hearing on the merits, but rather contemplates a process by which a nonrenewed teacher may know the nature and rationale of a decision not to retain him, and may have a reasonable opportunity to challenge that judgment in terms of the relevant standards of the institution.

AAUP concern with nonrenewal procedures has not been confined to general statements of policy. Most recently, the Association appeared in this Court as *amicus curiae,* supporting a petition for certiorari to review the judgment of the Court of Appeals in *Jones v. Hopper,* 410 F.2d 1323 (10th Cir. 1969). Since this Court's denial of the petition in *Jones* (397 U.S. 991 1970)), the volume of cases implicating rights of probationary faculty has expanded markedly. Cases similar to the instant case have arisen in several circuits and the courts of several states, with conflicting resolution and consequent uncertainty for the academic community. Moreover, a general change in the economic status of higher education, as well as in the mobility of the academic profession (tenure status is in relation to individual institutions), has made even

more critical the need for observance of fair procedures in the appraisal of nontenured faculty members. The issues implicated in this case are therefore of direct concern not only to beginning or other teachers holding probationary appointments but to the very purposes and objectives of higher education itself. It is exactly where tenure or other protective status is not present or applicable that it becomes particularly necessary to assure that academic freedom and related constitutional rights, properly defined and prescribed, are in fact respected. Accordingly, the Association on behalf of all its members has a deep concern with the course of the present litigation.

SUMMARY OF ARGUMENT

This brief develops two lines of argument, one related to the particular posture of this case, and the other concerning the broad constitutional issues which the case raises. In Part I, we argue that the Court of Appeals' disposition was clearly correct on the facts of the case. The District Court's grant of summary judgment prevented respondent from proving colorable allegations that his nonrenewal abridged constitutional rights. Moreover, summary dismissal of this complaint implied that a nontenured teacher is never entitled to a statement of reasons or to an internal hearing of any nature, no matter what the circumstances of the case. Unless respondent's substantive and procedural claims had been frivolous on the face of the complaint, further proceedings in the District Court were essential.

In Part II we set forth observations and arguments concerning more generally the procedural interests of nontenured college teachers. We advance several propositions: *first*, that the status of the probationary pro-

fessor clearly merits constitutional protection; *second,* that this Court has consistently secured substantive constitutional rights of public employees, including faculty at public colleges and universities, without regard to the claimant's status under state or local law—whether tenured or not; *third,* that substantive constitutional interests of nontenured faculty would be jeopardized in the absence of procedural safeguards surrounding the nonrenewal process; and *fourth,* that the procedures appropriate to each situation should be determined by a balancing of the pertinent interests on both sides. Finally, we contend that every case of this sort warrants *some* procedural safeguards to protect vital interests of academic freedom and constitutional liberties within the academic community.

ARGUMENT

I. THE JUDGMENT OF THE COURT OF APPEALS WAS CLEARLY CORRECT UNDER THE SPECIAL CIRCUMSTANCES OF THIS CASE.

It is essential to recognize at the outset the narrow scope of the decision below. The Court of Appeals held only that respondent was entitled to prove whether his summary termination, after five years of apparently satisfactory teaching, abridged his constitutional rights. That judgment was far from a holding that a nontenured faculty member has as a matter of course a constitutional right to a full hearing, either on campus or in court. Whatever may be the proper rule for the general case, we submit the instant case is a quite special one:

First, the complaint alleged clear violations of substantive constitutional rights. Respondent claimed he was denied continuing employment essentially as punishment for the exercise of his constitutional liberties.

These allegations, moreover, receive substantial corroboration—tantamount almost to admission—from the press release of the College President, to which recurrent reference was made in the opinion of the Court of Appeals. At least some of the acts apparently relied upon as the basis for the nonrenewal enjoy constitutional protection. The press release, for example, cited the use of respondent's name in an editorial advertisement critical of the college administration and governing board on matters of educational policy. Such a public statement would be squarely protected by *Pickering v. Board of Education,* 391 U.S. 563 (1968), even if it contained (as apparently it does not) false statements.[2] As indicated in the *Statement of Interest of Amicus,* both the 1940 *Statement of Academic Freedom and Tenure* and the 1966 *Statement on Government* likewise support the right, as a matter of academic standards, of a faculty member to speak publicly about his institution. Other acts apparently relied upon included respondent's attempt to present testimony to a legislative committee considering matters of higher education; such activities generally enjoy the protection of the First Amendment's "right of petition" clause, *cf., Edward v. South Carolina,* 372 U.S. 229 (1963).

Other factors might later be shown to have affected the College's decision to deny continuing employment in this case. Initially, however, respondent has alleged that the adverse judgment rested on constitutionally impermissible grounds. The District Court denied him an opportunity to support those allegations—thus im-

[2] Actually, respondent had disclaimed any connection with the advertisement, but the press release of the College President held nevertheless that his "*guilt by association*" could not be rejected. See Footnote 5 of the Opinion of the Court of Appeals.

plying, contrary to pertinent decisions of this Court, that even a conceded retaliation against the exercise of academic freedom or First Amendment liberties would be unreviewable. The summary judgment was thus erroneous.

Second, the absence of any internal procedures prior to nonrenewal justified the judicial inquiry mandated by the Court of Appeals. This is not a case in which the college or university has unequivocally reserved the right to terminate all contracts at will, on any ground, and without articulation of reasons. It is true the College purports not to recognize academic tenure in the manner that many institutions of higher learning do—that is, by assuring faculty that, after serving a probationary period as established by the institution, they shall be terminated only for adequate cause related, directly and substantially, to the fitness of the faculty member in his professional capacity as a teacher or researcher, duly substantiated in accordance with due process. Yet the policy under which respondent was employed creates an alternative form of employment security: "The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory, as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." (Footnote 3 of the Opinion of the Court of Appeals.). Contained as it is in the College's official Faculty Guide, this statement reflects an understanding that academic appointments, even though not "tenured" in the conventional sense, may in fact be terminated only for certain reasons.

The present case is strikingly like *Vitarelli v. Seaton*, 359 U.S. 535 (1959); an employing agency that

might have dismissed an employee summarily, without giving reasons or affording any procedural safeguards, voluntarily provided protection for certain kinds of terminations. Having established such safeguards, the agency could not dispense with them at will, even though it might have been free to hire and fire without them had it so chosen at the start: An employee who might in theory have been summarily discharged is entitled in practice, at the very least, to those protections the agency has voluntarily adopted. *Cf. Service v. Dulles*, 354 U.S. 363 (1957); *Yellin v. United States*, 374 U.S. 109 (1963).

Such analysis is reinforced by this Court's recent decision in *Bell v. Burson*, 402 U.S. 535 (1971). It was acknowledged at the outset that a state might require every applicant for a driver's license to have liability insurance or post security. But once the decision had been made to subject only certain licensees to such requirements, the relationship could not constitutionally be terminated in a particular case without a hearing. That conclusion, declared a unanimous Court, is "but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'" *Bell v. Burson, supra*, 402 U.S. at 539. Surely the opportunity of continuing employment in a college teaching post deserves safeguards at least comparable to those afforded holders of drivers' licenses.

The *Vitarelli* analysis applies with particular force in the instant case. Odessa College—presumably in order to attract and retain the services of teachers—provided explicitly that faculty members will forfeit their "permanent tenure" only under three conditions.

None of the three conditions were established in this case. As suggested above, the only activities cited by the College President which might possibly warrant a termination under the policies the College had bound itself to follow enjoy full constitutional protection. Any reliance upon such activities as the basis for termination would infringe basic constitutional liberties and violate academic freedoms which this Court has jealously guarded through a long line of decisions. Reliance upon such conduct without any sort of hearing or inquiry would, moreover, constitute a basic denial of due process.

The case, then, is not one of summary nonrenewal for which the employer's own policies require no explanation. Nor is this a case in which a rule or regulation of general applicability proscribes specific employee conduct and a violation is conceded in the particular case, *cf. Beilan v. Board of Education,* 357 U.S. 399 (1958); *Lerner v. Casey,* 357 U.S. 468 (1958); *Nelson v. County of Los Angeles,* 362 U.S. 1 (1960). (Were they apposite, *amicus curiae* would argue these decisions are inconsistent with later pronouncements of this Court and hence can no longer be relied upon. But since they are readily distinguishable, such extended analysis seems unnecessary here.)

On the contrary, this case is governed by *Slochower v. Board of Higher Education,* 350 U.S. 551 (1956). As indicated *infra,* Slochower's status as a tenured faculty member was apparently not significant to a decision that his summary discharge abridged constitutional liberties.

Here as in *Slochower,* no inquiry whatever has been made whether the acts apparently relied upon as the basis for termination demonstrate unfitness to hold a

faculty position. Had the Texas Board declared in terms that any professor who misses a class to testify in Austin forfeits his position, this might be a different case—though such a proscription would be constitutionally vulnerable, *cf. Pickering v. Board of Education, supra.* The present case is squarely governed by the concluding paragraph of the *Slochower* opinion:

> This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law. (350 U.S. at 559.)

The continuing vitality and broad scope of *Slochower* are attested by this Court's recent decision in *Connell v. Higginbotham,* 403 U.S. 207 (1971), striking down part of a Florida statutory loyalty oath requirement. Citing *Slochower,* the Court held that the "belief" provision of the oath "falls within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process." 403 U.S. at 208. This judgment, as well as the *Slochower* rationale, is as applicable to probationary as it is to tenured faculty. As indicated by *Whitehill v. Elkins,* 389 U.S. 54 (1967), it relates as well to applicants for public employment. The protection of persons *holding continuing,* if nontenured, *positions* should now be beyond doubt.

Indeed, if anything the present case is *a fortiori* from *Slochower* in this regard. For the conduct cited

as the basis for Slochower's dismissal (invoking the self-incrimination privilege before a legislative investigating committee) was not within the scope of his constitutional rights as a government employee; the only apparently relevant conduct of respondent seems well within the zone of his First Amendment freedoms.

For the moment, it is unnecessary to determine whether respondent's activities lay beyond the reach of administration censure or sanction. Until some adequate inquiry has been made into those activities, their specific nature, and their relevance to respondent's fitness to teach or to serve as a faculty member, any judgment about the constitutionality of a dismissal based upon those activities would be premature. The Court of Appeals has said that further inquiry into these matters is essential. That judgment follows from the apposite precedents of this Court. Accordingly, a remand would be appropriate for this reason alone.

The disposition of this case, moreover, inherently requires a careful scrutiny of particular facts and circumstances. The availability and extent of procedural safeguards for termination or denial of government benefits are particularized questions, as this Court has consistently held. "[C]onsideration of what procedures due process may require under any given set of circumstances," declared the Court in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961), "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." This approach was recently reinforced in *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). (*Cf. Adler v. Board of Education*, 342 U.S. 485, 497-508 (1952) (Frankfurter, J., dissenting)).

The mandate to consider the distinctive circumstances of the case, to balance individual against institutional interests, makes particularly inappropriate the disposition of a claim such as respondent's on summary judgment. For this reason, as well as others outlined above, the Court of Appeals was clearly right to remand the case for development of a fuller record. To attempt a balancing of conflicting interests at so early a stage, with so little hard data, would involve largely uninformed speculation. To do so on a matter and issues of developing critical importance to the academic community would be particularly inappropriate.

II. THE CONSTITUTIONAL RIGHTS AND LIBERTIES OF NONTENURED FACULTY MEMBERS DEPEND FOR ADEQUATE PROTECTION UPON PROCEDURAL SAFEGUARDS

For the reasons suggested above, broad aspects of the rights of nontenured professors are not necessarily before the Court at this time. The Court of Appeals, however, thought it appropriate for the guidance of the District Court to discuss those issues. Accordingly, the Association's views may also be appropriate in the event this Court reaches those broader questions. At the outset, we should indicate substantial agreement with the central premise of the opinion below: That recourse to a statement of reasons and to an internal hearing in a nonrenewal case, and the specific nature of such a hearing, may not be determined on rigid, doctrinaire lines, but should reflect the special needs of the situation and the range of individual and institutional interests. We contend, further, that certain basic safeguards are essential to protect and ensure the constitutional liberties, as well as the academic freedom, of nontenured professors. As indicated in the *Statement of Interest of Amicus,* in the development

of its various pertinent policy statements, the Association has endeavored to reflect a similar commitment to careful weighing of often opposed, sometimes finely balanced, interests.

A. The Interest or Status of the Nontenured College Teacher Merits Constitutional Protection

This Court has consistently rejected the illusory distinction between "rights" and "privileges." See, *e.g., Bell v. Burson,* 402 U.S. 535 (1971); *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970); *Sherbert v. Verner,* 374 U.S. 398, 404 (1963); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 *Harv. L. Rev.* 1439 (1968). Instead, the pivotal question in each case involving the denial or termination of government benefits has been whether the status or interest involved was a sufficient "entitlement" to merit constitutional protection. A host of relations between citizen and government have received such recognition in recent cases—the license to drive an automobile, receipt of welfare benefits or unemployment compensation, admission to the bar, tenancy in public housing projects, and many others. Indeed, in no recent case has this Court found any such interest so gratuitous or so frivolous that government was free to condition it arbitrarily or terminate the relationship in disregard of substantive and procedural fairness.

Against this background, there can be little doubt that a teaching position in a college or university constitutes an entitlement of a rather high order—perhaps, in fact, more clearly deserving of constitutional solicitude than many relationships to which this Court has afforded substantial protection. *Cf. Shelton v. Tucker,* 364 U.S. 479 (1960) and *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). Confusion has arisen,

however, over the particular interest of the nontenured teacher. Several courts have suggested, *e.g., Jones v. Hopper,* 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970); *Freeman v. Gould Special District of Lincoln County,* 405 F.2d 1153 (8th Cir. 1969), *cert. denied,* 396 U.S. 843 (1969) that such persons lack a sufficient "expectancy" in continuing employment to challenge the agency's power to deny reappointment at will, with or without good cause, with or without giving reasons. On this basis probationary employees have been held without recourse to the federal courts to establish claims that an unexplained dismissal was, for example, a covert retaliation for the exercise of clearly protected First Amendment rights.

The distinction reflects a basic misunderstanding of the status and expectation of the nontenured teacher. As indicated in the *Statement of Interest of Amicus,* and as other courts have recognized, *e.g., Pred v. Board of Public Instruction,* 415 F.2d 851 (5th Cir. 1969); *Drown v. Portsmouth School Dist.,* 435 F.2d 1182 (1st Cir. 1970) *cert. denied,* 402 U.S. 972 (1971); *Roth v. Board of Regents,* 310 F. Supp. 972 (W. D. Wis. 1970), *aff'd.* ——F.2d—— (7th Cir. 1971), petition for *certiorari* filed August 3, 1971, service in a year-to-year employment relationship implies certain expectations as to renewal. As the Court of Appeals for the First Circuit observed in the *Drown* case: "The teacher, particularly one at the outset of his career, is in the position of having invested in preparation for a career which depends mainly on the willingness of public bodies to employ him. Such willingness . . . is seriously dissipated if not destroyed when an early employer refuses to rehire the teacher." 435 F.2d at 1184. A similar dissipation of willingness can be expected of

private as well as of public colleges and universities. There is not only involved the teacher's livelihood; academic freedom itself depends upon his ability to continue the practice of his profession with minimal risk and fear of wholly arbitrary termination of his opportunity to do so.

The expectation of continued employment may not always exist of course; its specific nature may also vary. Some academic positions—certain visiting professorships, special lectureships, and teaching assistantships—are understood to be "one year appointments" in the real rather than the technical sense. The holder of such a position would not ordinarily claim that failure to receive a renewal contract constituted a "termination"—even though in occasional and special cases such a person might in fact be asked to remain on for a second year. Positions of this kind are generally like clerkships to Justices of this Court; while a few clerks may expect or even be asked at the outset to remain for a second year, most simply assume that the appointment is for a single Term and regularly seek post-clerkship employment during that Term.

For most faculty members on the professorial ladder, however, the expectation is wholly different: Even though the contract itself is often for a single year at a time, subject to renewal or extension, the expectation in most institutions of higher learning is that the continuation of employment will be determined on the basis of an appropriate review and appraisal of the faculty member's performance and of his potential contribution to the institution and the academic unit of which he is a member. Because of this widely shared understanding, a termination without such review or appraisal severely frustrates the nontenured professor's expectations and aspirations.

Moreover, the interest of the probationary public employee has elicited judicial inquiry whenever dismissal was based upon a stated and constitutionally invalid ground such as a denial of First or Fourteenth Amendment rights. The resulting distinction has created a paradox: If the employing agency terminates a service by giving a constitutionally vulnerable reason, judicial review has long been available despite the probationary nature of the relationship. If, however, the agency gave no reason, a decision not to renew was as a practical matter insulated from judicial inquiry. Administrative candor was thus penalized, with the result that valid and invalid grounds alike were best left unstated by the administrator who wished to keep out of court. Meanwhile, the injury to the person terminated *without* explanation and *without* procedural safeguards may well have been the graver, since speculation of prospective future employers could run the full gamut of possible causes for nonretention. In any event, by finding that discharge for a *constitutionally invalid* reason justified intervention, the courts have implicitly recognized that the probationer's status merits constitutional protection.

Probationary status in higher education is especially deserving of solicitude, since academic freedom is substantially at stake. Frequently, it is directly involved in particular cases. Generally, to the extent that appropriate protection from arbitrary termination is not provided, to that extent the exercise of academic freedom is inhibited and diminished. In a long line of decisions this Court has underscored the essentiality of liberty of thought and inquiry in the colleges and universities of this country. The principle is forcefully

stated in *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967):

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

For the reasons indicated in the *Statement of Interest of Amicus,* the Association concurs. *Supra,* pp. 5 and 6.

To a degree, the academic freedom of tenured members of the faculty is protected by internal remedies. Where the protection of tenure is absent, however—as for all faculty members at some institutions, and junior or recently appointed faculty at most institutions—the internal remedies are either uncertain or unavailable. Yet the termination of a nontenured assistant professor for the exercise of protected rights jeopardizes academic freedom no less than the dismissal of a tenured faculty member on similar grounds. Thus the basic interests of academic freedom, as well as particular interests of individual teachers, call for legal protection of nontenured status. *Cf.* Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 *Duke L.J.* 841.

B. This Court has Recognized Substantive Constitutional Rights of Public Employees Generally and Faculty Specifically Without Regard to the Claimant's Status Under State or Local Law.

In the recent evolution of substantive constitutional rights of government employees, including professors, the distinction between permanent and probationary status under state or local law has played little or no

part. Decisions of this Court striking down loyalty oaths and disclaimers as conditions of public employment, for example, have involved some plaintiffs already tenured or permanent, others in probationary status, and still others who were merely applicants for initial positions. In various oath disclaimer cases —*Cramp v. Board of Public Instruction,* 368 U.S. 278 (1961); *Baggett v. Bullitt,* 377 U.S. 360 (1964); *Elfbrandt v. Russell,* 384 U.S. 11 (1966); *Whitehill v. Elkins,* 389 U.S. 54 (1967); and *Connell v. Higginbotham,* 403 U.S. 207 (1971)—no attention appears to have been given to the status of the person challenging the constitutionality of the requirement. In *Whitehill,* in fact, the plaintiff had merely been offered a visiting lecturer appointment, which he was unwilling to accept if contingent upon signing the oath challenged in the suit.

The permanent-probationary (or nontenured) distinction has been similarly irrelevant in analogous lines of decision affirming the constitutional rights of public employees. Protection of the right to criticize policies of one's superiors or the employing agency, *Pickering v. Board of Education, supra,* is available no less to nontenured than to tenured employees. Freedom from onerous and burdensome restrictions on associations and extra-curricular activities, *Shelton v. Tucker,* 364 U.S. 479 (1960), is not confined to permanent employees. Recent decisions of lower federal courts have also deemed this distinction largely irrelevant in a variety of contexts—protection against reprisal for union affiliation or activity, *McLaughlin v. Tilendis,* 398 F.2d 287 (7th Cir. 1968); academic freedom to teach in the classroom without fear of censorship or reprisal, *Parducci v. Rutland,* 316 F. Supp. 352

(M.D. Ala. 1970); *Hetrick v. Martin,* 322 F. Supp. 545 (E.D. Ky. 1971); and other comparable safeguards.

However significant the permanent-probationary distinction may be as a matter of state or local administrative and contract law, it has been properly rejected as a measure of the scope of constitutional rights and liberties. The underlying principle is the essence of the doctrine of unconstitutional conditions: While government may have general powers to deny employment outright to applicants, or even to terminate that relationship at will, it may not use such power to invade or erode the constitutional rights and liberties of the applicant or incumbent, or to impair basic tenets of academic freedom which protect higher education. See *Sherbert v. Verner, supra; Speiser v. Randall,* 357 U.S. 513 (1958). The enforcement of this principle properly disregards for these purposes the local law classification of the employment relationship; an employee's *constitutional* right to speak, publish, and worship freely, or to be free of racial or other arbitrary discrimination, surely cannot be qualified by the special contractual relationship with an employing agency. Thus the substantive constitutional rights and liberties of tenured and nontenured public workers are essentially coextensive.[3]

---

[3] There is one possible exception to this generalization. In *Nelson v. County of Los Angeles, supra,* the Court apparently distinguished the cases of Globe (a temporary employee) and Nelson (a permanent employee of the same County). While Nelson's case was affirmed by an equally divided Court without opinion, Globe's discharge for refusing to testify before a Congressional subcommittee was affirmed by a 5-3 margin. But it would be hazardous to infer that one member of the Court felt Nelson entitled to greater protection than Globe. Also, in regard to both employees, the lower courts and this Court acted to affirm previous administrative action

C. The Substantive Constitutional and Academic Freedom Interests of Nontenured Faculty Would Be Gravely Jeopardized Without Procedural Safeguards for Nonrenewal.

If nontenured as well as tenured teachers have substantial substantive rights and liberties, then it follows that safeguards must exist to protect those interests *in practice*. For without such safeguards, resort to unexplained and unreviewable summary termination could easily conceal clearly unconstitutional actions. If an administrator could implement his racial bias by denying reappointment to a black (or white) worker without stating any reasons, if a union officer on temporary status could be terminated without explanation, or if a persistent critic of official policy could be summarily nonrenewed, then the substantive civil rights and liberties of government employees would exist *in vacuo*—save to the extent procedural safeguards were prescribed by statute or regulation, or the responsible officials were either candid or careless enough to state reasons where none were required.

The vital relationship between substantive rights and procedural safeguards has been forcefully described by Judge Doyle, in *Roth v. Board of Regents*, 310 F. Supp. 972, 975-76 (W.D. Wis. 1970), *aff'd.* —— F.2d —— (7th Cir. 1971), pet. for *cert.* filed August 3, 1971:

> If a decision not to renew the employment contract of a non-tenured university professor may

---

or proceedings. More important, in view of the equal division in Nelson's case, the opinion reviewing Globe's case contains no comparative comments which might illumine the difference (if any) between the constitutional claims of the temporary and permanent county workers. This one case, then, seems hardly adequate to justify such a distinction. Nor does there appear to be any other precedent supporting it. The whole course of this Court's decisions over the past decade involving rights of government employees, indeed, argues against any such distinction.

be based consciously and deliberately on the fact that he has written a scholarly letter to the newspaper in support of the President's policy on Viet Nam, or on the fact that he is white, or on the fact that he is a Protestant, or on the fact that he is a Republican, and if the decision may be based on the university president's belief that the professor physically struck a student at a certain time and place, whereas in fact the professor was not present at that time and place and the incident never occurred, and if there need be no reasoned basis whatever for the decision, then it may be concluded that the Constitution of the United States affords him no substantive protection. If he enjoys no substantive protection under the Constitution—that is, if the decision not to renew may be based upon any reason or may be based upon no reason—then it also follows that he need be afforded no procedural protection by the Constitution; to require the university administration to state the reason for the decision, or to state that there is no reason for the decision, or to provide an opportunity to the professor to be heard, would serve no purpose.

On the other hand, if the Constitution of the United States forbids a decision consciously and deliberately based on the professor's otherwise protected speech activity, or his race, or his religion, or his political affiliation, then this substantive right may require procedural protection . . . .

Also, if the Constitution forbids a decision based upon a wholly false assumption (for example, that the professor struck the student), or if it forbids a decision which is wholly unreasoned, then this substantive right may also require procedural protection.

As Judge Doyle's opinion indicates, the substantive rights and liberties which this Court has secured to nontenured public employees are only as strong in practice as the procedural safeguards available upon termination or nonrenewal. The relationship is most significant in higher education, where the Court's special concern for academic freedom is at stake. See also Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 *Duke L. J.,* 841, 869. It would be anomalous to hold that while all faculty members enjoy academic freedom in the classroom and outside, only tenured faculty are effectively able to vindicate or exercise that freedom. Precisely because tenured faculty do generally enjoy a higher level of *internal* protection, nontenured professors may need stronger *external* protection of the kind the Court of Appeals found appropriate in this case. Otherwise, the result might well be to create by default two classes of basic substantive rights within the academic profession.

D. A Balancing of Relevant Interests of Individual and Institution Justifies Procedural Safeguards for Nontenured Faculty.

Particular claims to procedural safeguards must be appraised by balancing relevant interests, *Goldberg v. Kelly,* 397 U.S. 254, 263 (1970); *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961); *cf. Hannah v. Larche,* 363 U.S. 420, 440, 442 (1960). The process varies not only from context to context but from one particular case to another. While we contend that in every case involving nonrenewal of a probationary faculty member, *some* procedural safeguards are appropriate, the *precise extent* of protection will vary according to the particular interests implicated. It is for this reason, among others, that we

urge that the Court of Appeals was correct in remanding the case for development of the kind of record that would permit the balancing process mandated by this Court in *Goldberg v. Kelly, supra.*

Despite the variable and varying nature of the interests, certain general guidelines may be formulated. The Association's *Statement on Nonrenewal Procedures* (set forth in the Appendix to this Brief), like previous statements, seeks to balance conflicting interests in much the manner this Court has prescribed in *Kelly.* The conclusion—that the balance favors some procedural safeguards for nonretention or nonrenewal—seems readily applicable to the constitutional context as well. Accordingly, we may review the opposing interests here as they bear on the instant litigation and similar cases now in the lower courts.

Interests in Favor of Safeguards. The *Nonrenewal Statement,* in discussing the interests that Association experience indicates as favoring the giving of reasons to a terminated faculty member who requests them, states:

> . . . He may be honestly unaware of the reasons for a negative decision, and the decision may be based on a judgment of shortcomings which he could easily remedy if informed of them. A decision not to renew an appointment may be based on erroneous information which the faculty member could readily correct if he were informed of the basis for the decision. Again, the decision may be based on considerations of institutional policy or program development which have nothing to do with the faculty member's competence in his field, and if not informed of the reasons he may mistakenly assume that a judgment of inadequate per-

formance on his part has been made. In the face of a persistent refusal to supply the reasons, a faculty member may be more inclined to attribute improper motivations to the decision-making body or to conclude that its evaluation has been based upon inadequate consideration. If he wishes to request a reconsideration of the decision, or a review by another body, his ignorance of the reasons for the decision will create difficulties both in reaching a decision whether to initiate such a request and in presenting his case for reconsideration or review. (Appendix, p. 63.)

In a recent case involving secondary school teacher nonrenewals, the Court of Appeals for the First Circuit in *Drown v. Portsmouth School District, supra,* at 1184-1185, despite its reluctance to mandate broad procedural safeguards in the context of that case, has recently recognized the same interests:

From the point of view of the teacher, such notice would give him the opportunity informally to correct a decision made on the basis of mistaken or false facts. Moreover, he might find that he had evidence that could be used to support a claim that he was not rehired for constitutionally impermissible reasons. Even if the reasons assigned were false ones, demonstrating their falsity would have probative value in a claim that the real reasons lie elsewhere. Additionally, the teacher would have the extra benefit of knowing where his performance failed to live up to expectations—a benefit that may not be constitutionally required but which is surely desirable. Finally, if the reason were to lie in a judgment that the teacher was too innovative and unconventional, this very fact might be turned into a recommendation in the eyes of another possible employer.

Several cautions should be noted—cautions which help to refine the balance. Many terminations are easily explained—for example, because of the phasing out or contraction of a program or department, or a sudden change in the teacher's own professional field. In other cases, the nonrenewed faculty member himself may not desire a statement of reasons and will thus not make the request. As the Association's *Nonrenewal Statement* notes:

> If he is informed of them [the reasons] he can be placed under an obligation to divulge them to the appointing body of another institution if it inquires why he is leaving his present position. Similarly, a written record is likely to become the basis for continuing responses by his former institution to prospective appointing bodies and may thus jeopardize his chances for obtaining positions over an extended period. (Appendix, p. 63.)

These interests of the individual faculty member are not necessarily confined to the giving of reasons for nonrenewal. After a statement of reasons is received, these same interests may warrant additional procedures. Certainly, where the faculty member has reason to believe that nonrenewal of his appointment was based on considerations violative of his academic freedom, an opportunity should be available to him to establish his claim. As indicated and described in the *Statement of Interest of Amicus,* academic procedures recognizing both the interests of the individual faculty member and of the institution were developed some years ago for this purpose. These procedural standards have been reiterated and are set forth in detail in the *Nonrenewal Statement* included in the Appendix. (Pages 66-68).

Where the gravamen of the grievance is not directly based on academic freedom but relates rather to adequacy of consideration of the faculty member's qualifications, the additional procedures recommended by the *Nonrenewal Statement* call for a determination by a review committee, upon petition of the faculty member, whether the decision of the appropriate faculty body was the result of adequate consideration in terms of the relevant standards of the institution. If it concludes that such consideration was not given, its appropriate response would not be to substitute its own judgment on the merits but to recommend reconsideration by the appropriate faculty body.

Interests of the Institution. AAUP has attempted to articulate these interests in its *Nonrenewal Statement*:

> A major responsibility of the institution is to recruit and retain the best qualified faculty within its means. In a matter of such fundamental importance, the institution, through the appropriate faculty agencies, must be accorded the widest latitude consistent with academic freedom and the standards of fairness . . . .
>
> At many institutions, moreover, the procedures of evaluation and decision may make it difficult, if not impossible, to compile a statement of reasons which precisely reflects the basis of the decision. When a number of faculty members participate in the decision, they may oppose a reappointment for a variety of reasons, few or none of which may represent a majority view. To include every reason, no matter how few have held it, in a written statement to the faculty member may misrepresent the general view and damage unnecessarily both the faculty member's morale and his professional future. (Appendix, pp. 62 and 64.)

However, even the Court of Appeals for the First Circuit, in the *Drown* case, recognized that:

> From the viewpoint of the school board, a requirement that it state its reasons for not rehiring a non-tenured teacher would impose no significant administrative burden. Nor would it significantly inhibit the board in ridding itself of incompetent teachers. The workability of such a requirement is evident from the fact that several states presently require their school boards to do so. *E.g.* Wash. Rev. Code Ann. § 28.67.070 (1964). As to access to administrative evaluations, we would assume that, since part of their objective is to help the teacher improve, their content is made known to the teacher as a matter of policy. Access as of right has been granted in a number of states. *E.g.*, Conn. Gen. Stat. Ann. § 10-15(a) (Supp. 1969). Finally, while access by a teacher to an administrator's frank appraisal of his ability might lead to embarrassment and friction if the teacher-administrator relationship were to continue, such a consideration is moot when the teacher has not been rehired. The relationship could be further impaired only in the unlikely case that the decision not to rehire were reversed despite negative reports; and in such a case, the avoidance of an unjustified non-retention must outweigh the danger of disharmony. [Footnotes omitted.] (435 F.(2d) at 1185)

Clearly a commitment to fair procedures for nonrenewals does not obligate the college or university to confer "instant tenure" upon probationary teachers. There is no occasion to abolish or undermine the distinction between tenure and nontenure status—a dis-

tinction which is fundamental to AAUP policy. The grounds on which a nonreappointment may rest are far broader than the narrow range of conduct that may constitute "cause" for dismissal of a tenured professor. As the *Nonrenewal Statement* explains:

> Complaints of inadequate consideration are likely to relate to matters of professional judgment, where the department or departmental agency should have primary authority. For this reason, Committee A believes that the basic functions of the review committee should be to determine whether adequate consideration was given to the appropriate faculty body's decision and, if it determines otherwise, to request reconsideration by that body.
>
> It is easier to state what the standard "adequate consideration" does not mean than to specify in detail what it does. It does not mean that the review committee should substitute its own judgment for that of members of the department on the merits of whether the candidate should be reappointed or given tenure. The conscientious judgment of the candidate's departmental colleagues must prevail if the invaluable tradition of departmental autonomy in professional judgments is to prevail. The term "adequate consideration" refers essentially to procedural rather than substantive issues: Was the decision conscientiously arrived at? Was all available evidence bearing on the relevant performance of the candidate sought out and considered? Was there adequate deliberation by the department over the import of the evidence in the light of the relevant standards? Were irrelevant and improper standards excluded from

consideration? Was the decision a *bona fide* exercise of professional academic judgment? These are the kinds of questions suggested by the standard "adequate consideration."

If in applying this standard the review committee concludes that adequate consideration was not given, its appropriate response should be to recommend to the department that it assess the merits once again, this time remedying the inadequacies of its prior consideration. (Appendix, pp. 68-69.)

The Association believes that such a procedure would recognize the legitimate interest of faculty, without entailing—to quote the *Nonrenewal Statement*—the "risk that the important distinction between tenure and probation will be eroded." (Appendix, page 62.)

Interests of the college or university—flexibility in the making of academic personnel judgments, and the maintenance of high standards in employment and retention of faculty—must be weighed carefully in determining the procedures appropriate to such cases. The effect upon general review of faculty performance, the difficulty of articulating reasons for nonreappointment or of holding a hearing, and other factors should be weighed. But considerations of administrative convenience or efficiency, or the cost of more elaborate procedures, may not be allowed to defeat the constitutional interests of nontenured faculty, *cf. Cooper v. Aaron,* 358 U.S. 1 (1958).

In view of the particularity of the balancing process required by experience and by this Court's decisions, and the absence of an adequate record in this case, we feel it would be as inappropriate for us to specify procedures in the present posture of the case as we feel

it was inappropriate for the District Court to foreclose any further proceedings in advance of developing a record. Instead, we have undertaken to suggest (as did the Court of Appeals) the kinds of considerations generally relevant and applicable in cases of this type and which have proved desirable in the experience of the academic community. It is the Association's conviction that the law in this area has begun to evolve and should continue to evolve through relevant cases under this Court's general guidance—based upon a broad recognition that the academic freedom and constitutional rights of nontenured and probationary faculty members do require *some* procedural safeguards in *every* case.

CONCLUSION

For the reasons outlined in this brief, *amicus curiae* respectfully urges that the judgment of the Court of Appeals be affirmed, in order to permit further proceedings in the District Court.

Respectfully submitted,

HERMAN I. ORENTLICHER
1 Dupont Circle, N.W., Suite 500
Washington, D. C. 20036

WILLIAM W. VAN ALSTYNE
Duke University
School of Law
Durham, North Carolina 27706

Attorneys for Amicus Curiae

Of Counsel:

ROBERT M. O'NEIL
University of California School of Law
Berkeley, California 94720

September, 1971

APPENDIX

A. Academic Freedom and Tenure

1940 STATEMENT OF PRINCIPLES AND INTERPRETIVE COMMENTS

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

The 1940 Statement is printed below, followed by Interpretive Comments as developed by representatives of the American Association of University Professors and the Association of American Colleges during 1969.

The following organizations officially endorsed the 1940 Statement in the years indicated.

Association of American Colleges 1941
American Association of University Professors 1941
American Library Association (adapted for librarians) 1946
Association of American Law Schools 1946
American Political Science Association 1947
American Association of Colleges for Teacher Education 1950
American Association for Higher Education 1950
Eastern Psychological Association 1950
American Philosophical Association:
Western Division 1952
Eastern Division 1953
Southern Society for Philosophy and Psychology 1953
American Psychological Association 1961
American Historical Association 1961

Modern Language Association of America 1961
American Economic Association 1962
American Farm Economic Association 1962
American Philosophical Association, Pacific Division 1962
Midwest Sociological Society 1963
Organization of American Historians 1963
American Philological Association 1963
American Council of Learned Societies 1963
Speech Association of America 1963
American Sociological Association 1963
Southern Historical Association 1963
American Studies Association 1963
Association of American Geographers 1963
Southern Economic Association 1963
Classical Association of the Middle West and South ..1964
Southwestern Social Science Association 1964
Archaeological Institute of America 1964
Southern Management Association 1964
American Educational Theatre Association 1964
South Central Modern Language Association 1964
Southwestern Philosophical Society 1964
Council for the Advancement of Small Colleges 1965
Mathematical Association of America 1965
Arizona Academy of Science 1965
American Risk and Insurance Association 1965
Academy of Management 1965
American Catholic Historical Association 1966
American Catholic Philosophical Association 1966
Association of State Colleges and Universities 1966
Association of Education in Journalism 1966
Western History Association 1966
Mountain-Plains Philosophical Conference 1966
Society of American Archivists 1966
Southeastern Psychological Association 1966
Southern Speech Association 1966
American Association for the Advancement of Slavic Studies 1967
American Mathematical Society 1967
College Theology Society 1967

Council on Social Work Education 1967
American Association of Colleges of Pharmacy 1967
American Academy of Religion 1967
American Catholic Sociological Society 1967
American Society of Journalism School Administrators 1967
John Dewey Society for the Study of Education and Culture 1967
South Atlantic Modern Language Association 1967
American Finance Association 1967
Catholic Economic Association 1967
United Chapters of Phi Beta Kappa 1968
American Society of Christian Ethics 1968
American Association of Teachers of French 1968
Appalachian Finance Association 1968
Association of Teachers of Chinese Language and Culture 1968
American Society of Plant Physiologists 1968
University Film Association 1968
American Dialect Society 1968
American Speech and Hearing Association 1968
Association of Social and Behavioral Scientists 1968
National College Physical Education Association for Men 1969
American Real Estate and Urban Economics Association 1969
History of Education Society 1969
Council for Philosophical Studies 1969
American Physicists Association 1969
American Musicological Society 1969
American Association of Teachers of Spanish and Portuguese 1969
Texas Junior College Teachers Association 1970
College Art Association of America 1970
Society of Professors of Education 1970
American Anthropological Association 1970
The American Association of Theological Schools 1970
American Association of Schools and Departments of Journalism 1971

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights. [1] *

Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

Academic Freedom

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. [2] Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment. [3]

---

* Numbers in brackets refer to Interpretive Comments which follow.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman. [4]

Academic Tenure

(a). After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, [5] the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even

though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. [6] Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period. [7]

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have. [8]

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution. [9]

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

Interpretations

At the conference of representatives of the American Association of University Professors and of the Association of American Colleges on November 7-8, 1940, the

following interpretations of the 1940 *Statement of Principles on Academic Freedom and Tenure* were agreed upon:

1. That its operation should not be retroactive.

2. That all tenure claims of teachers appointed prior to the endorsement should be determined in accordance with the principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure.

3. If the administration of a college or university feels that teacher has not observed the admonitions of Paragraph (c) of the section on *Academic Freedom* and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a)(4) of the section on *Academic Tenure.* In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Interpretive Comments

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure *with leading educational associations and with individual faculty members and administrators, a Joint Committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the Joint Committee felt the preferable approach was to formulate interpretations of the Statement in terms of the experience gained in implementing and applying the Statement for over thirty years and of adapting it to current needs.*

The Committee submitted to the two Associations for their consideration the following "Interpretive Comments." These interpretations were approved by the

Council of the American Association of University Professors in April, 1970, and endorsed by the Fifty-sixth Annual Meeting as Association policy.

In the thirty years since their promulgation, the principles of the 1940 *Statement of Principles on Academic Freedom and Tenure* have undergone a substantial amount of refinement. This has evolved through a variety of processes, including customary acceptance; understandings mutually arrived at between institutions and professors or their representatives, investigations and reports by the American Association of University Professors, and formulations of statements by that Association either alone or in conjunction with the Association of American Colleges. These comments represent the attempt of the two associations, as the original sponsors of the 1940 Statement, to formulate the most important of these refinements. Their incorporation here as Interpretive Comments is based upon the premise that the 1940 Statement is not a static code but a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances.

Also, there have been relevant developments in the law itself reflecting a growing insistence by the courts on due process within the academic community which parallels the essential concepts of the 1940 Statement; particularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment. As the Supreme Court said in *Keyishian* v. *Board of Regents* 385 U.S. 589 (1967), "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

The numbers refer to the designated portion of the 1940 Statement on which interpretive comment is made.

1. The Association of American Colleges and the American Association of University Professors have long recognized that membership in the academic profession carries with it special responsibilities. Both Associations either separately or jointly have consistently affirmed these responsibilities in major policy statements, providing guidance to the professor in his utterances as a citizen, in the exercise of his responsibilities to the institution and students, and in his conduct when resigning from his institution or when undertaking government-sponsored research. Of particular relevance is the *Statement on Professional Ethics*, adopted by the Fifty-second Annual Meeting of the AAUP as Association policy and published in the *AAUP Bulletin* (Autumn, 1966, pp. 290-291).

2. The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for the teacher to avoid persistently intruding material which has no relation to his subject.

3. Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure.

4. This paragraph is the subject of an Interpretation adopted by the sponsors of the 1940 Statement immediately following its endorsement which reads as follows:

> If the administration of a college or university feels that a teacher has not observed the admonitions of Paragraph (c) of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a)(4) of the section on Academic Tenure. In pressing such charges the administration should remember that teachers are citi-

zens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Paragraph (c) of the 1940 Statement should also be interpreted in keeping with the 1964 *Committee A Statement on Extramural Utterances* (*AAUP Bulletin*, Spring, 1965, p. 29) which states inter alia: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his position. Extramural utterances rarely bear upon the faculty member's fitness for his position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar."

Paragraph V of the *Statement on Professional Ethics* also deals with the nature of the "special obligations" of the teacher. The paragraph reads as follows:

> As a member of his community, the professor has the rights and obligations of any citizen. He measures the urgency of these obligations in the light of his responsibilities to his subject, to his students, to his profession, and to his institution. When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university. As a citizen engaged in a profession that depends upon freedom for its health and integrity, the professor has a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time probationary as well as to the tenured teacher,

but also to all others, such as part-time and teaching assistants, who exercise teaching responsibilities.

5. The concept of "rank of full-time instructor or a higher rank" is intended to include any person who teaches a full-time load regardless of his specific title.*

6. In calling for an agreement "in writing" on the amount of credit for a faculty member's prior service at other institutions, the Statement furthers the general policy of full understanding by the professor of the terms and conditions of his appointment. It does not necessarily follow that a professor's tenure rights have been violated because of the absence of a written agreement on this matter. Nonetheless, especially because of the variation in permissible institutional practices, a written understanding concerning these matters at the time of appointment is particularly appropriate and advantageous to both the individual and the institution.

7. The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one. If the decision is affirmative, the provisions in the 1940 Statement with respect to the termination of services of teachers or investigators after the expiration of a probationary period should apply from the date when the favorable decision is made.

The general principle of notice contained in this paragraph is developed with greater specificity in the *Standards for Notice of Nonreappointment,* endorsed by the

---

* For a discussion of this question, see the "Report of the Special Committee on Academic Personnel Ineligible for Tenure," *AAUP Bulletin,* Autumn, 1966, pp. 280-282.

Fiftieth Annual Meeting of the American Association of University Professors (1964). These standards are:

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

(1) *Not later than March 1 of the first academic year of service,* if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

(2) *Not later than December 15 of the second academic year of service,* if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

(3) At least twelve months before the expiration of an appointment after two or more years in the institution.

Other obligations, both of institutions and individuals, are described in the *Statement on Recruitment and Resignation of Faculty Members,* as endorsed by the Association of American Colleges and the American Association of University Professors in 1961.

8. The freedom of probationary teachers is enhanced by the establishment of a regular procedure for the periodic evaluation and assessment of the teacher's academic performance during his probationary status. Provision should be made for regularized procedures for the consideration of complaints by probationary teachers that their academic freedom has been violated. One suggested procedure to serve these purposes is contained in the *Recommended Institutional Regulations on Academic Freedom and Tenure,* prepared by the American Association of University Professors.

9. A further specification of the academic due process to which the teacher is entitled under this paragraph is contained in the *Statement on Procedural Standards in Faculty Dismissal Proceedings*, jointly approved by the American Association of University Professors and the Association of American Colleges in 1958. This interpretive document deals with the issue of suspension, about which the 1940 Statement is silent.

The 1958 Statement provides: "Suspension of the faculty member during the proceedings involving him is justified only if immediate harm to himself or others is threatened by his continuance. Unless legal considerations forbid, any such suspension should be with pay." A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

The concept of "moral turpitude" identifies the exceptional case in which the professor may be denied a year's teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.

B. 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings

The following *Statement on Procedural Standards in Faculty Dismissal Proceedings* was prepared by a joint committee representing the Association of American Colleges and the American Association of University Professors and was approved by these two associations at their annual meetings in 1958. It supplements the 1940 *Statement of Principles on Academic Freedom and Tenure* by providing a formulation of the "academic due process"

that should be observed in dismissal proceedings. The exact procedural standards here set forth, however, "are not intended to establish a norm in the same manner as the 1940 *Statement of Principles on Academic Freedom and Tenure,* but are presented rather as a guide. . . ."

Introductory Comments

Any approach toward settling the difficulties which have beset dismissal proceedings on many American campuses must look beyond procedure into setting and cause. A dismissal proceedings is a symptom of failure; no amount of use of removal process will help strengthen higher education as much as will the cultivation of conditions in which dismissals rarely if ever need occur.

Just as the board of control or other governing body is the legal and fiscal corporation of the college, the faculty are the academic entity. Historically, the academic corporation is the older. Faculties were formed in the Middle Ages, with managerial affairs either self-arranged or handled in course by the parent church. Modern college faculties, on the other hand, are part of a complex and extensive structure requiring legal incorporation, with stewards and managers specifically appointed to discharge certain functions.

Nonetheless, the faculty of a modern college constitute an entity as real as that of the faculties of medieval times, in terms of collective purpose and functions. A necessary pre-condition of a strong faculty is that it have first-hand concern with its own membership. This is properly reflected both in appointments to and in separations from the faculty body.

A well-organized institution will reflect sympathetic understanding by trustees and teachers alike of their respective and complementary roles. These should be spelled out carefully in writing and made available to all. Trustees

and faculty should understand and agree on their several functions in determining who shall join and who shall remain on the faculty. One of the prime duties of the administrator is to help preserve understanding of those functions. It seems clear on the American college scene that a close positive relationship exists between the excellence of colleges, the strength of their faculties, and the extent of faculty responsibility in determining faculty membership. Such a condition is in no wise inconsistent with full faculty awareness of institutional factors with which governing boards must be primarily concerned.

In the effective college, a dismissal proceeding involving a faculty member on tenure, or one occurring during the term of an appointment, will be a rare exception, caused by individual human weakness and not by an unhealthful setting. When it does come, however, the college should be prepared for it, so that both institutional integrity and individual human rights may be preserved during the process of resolving the trouble. The faculty must be willing to recommend the dismissal of a colleague when necessary. By the same token, presidents and governing boards must be willing to give full weight to a faculty judgment favorable to a colleague.

One persistent source of difficulty is the definition of adequate cause for the dismissal of a faculty member. Despite the 1940 *Statement of Principles on Academic Freedom and Tenure* and subsequent attempts to build upon it, considerable ambiguity and misunderstanding persist throughout higher education, especially in the respective conceptions of governing boards, administrative officers, and faculties concerning this matter. The present statement assumes that individual institutions will have formulated their own definitions of adequate cause for dismissal, bearing in mind the 1940 Statement and standards which have developed in the experience of academic institutions.

This statement deals with procedural standards. Those recommended are not intended to establish a norm in the same manner as the 1940 *Statement of Principles on Academic Freedom and Tenure,* but are presented rather as a guide to be used according to the nature and traditions of particular institutions in giving effect to both faculty tenure rights and the obligations of faculty members in the academic community.

Procedural Recommendations

1. Preliminary Proceedings Concerning the Fitness of a Faculty Member

When reason arises to question the fitness of a college or university faculty member who has tenure or whose term appointment has not expired, the appropriate administrative officers should ordinarily discuss the matter with him in personal conference. The matter may be terminated by mutual consent at this point; but if an adjustment does not result, a standing or *ad hoc* committee elected by the faculty and charged with the function of rendering confidential advice in such situations should informally inquire into the situation, to effect an adjustment if possible and, if none is effected, to determine whether in its view formal proceedings to consider his dismissal should be instituted. If the committee recommends that such proceedings should be begun, or if the president of the institution, even after considering a recommendation of the committee favorable to the faculty member, expresses his conviction that a proceeding should be undertaken, action should be commenced under the procedures which follow. Except where there is disagreement, a statement with reasonable particularity of the grounds proposed for the dismissal should then be jointly formulated by the president and the faculty committee; if there is disagreement, the president or his representative should formulate the statement.

2. Commencement of Formal Proceedings

The formal proceedings should be commenced by a communication addressed to the faculty member by the president of the institution, informing the faculty member of the statement formulated, and informing him that, if he so requests, a hearing to determine whether he should be removed from his faculty position on the grounds stated will be conducted by a faculty committee at a specified time and place. In setting the date of the hearing, sufficient time should be allowed the faculty member to prepare his defense. The faculty member should be informed, in detail or by reference to published regulations, of the procedural rights that will be accorded to him. The faculty member should state in reply whether he wishes a hearing and, if so, should answer in writing, not less than one week before the date set for the hearing, the statements in the president's letter.

3. Suspension of the Faculty Member

Suspension of the faculty member during the proceedings involving him is justified only if immediate harm to himself or others is threatened by his continuance. Unless legal considerations forbid, any such suspension should be with pay.

4. Hearing Committee

The committee of faculty members to conduct the hearing and reach a decision should either be an elected standing committee not previously concerned with the case or a committee established as soon as possible after the president's letter to the faculty member has been sent. The choice of members of the hearing committee should be on the basis of their objectivity and competence and of the regard in which they are held in the academic community. The committee should elect its own chairman.

5. Committee Proceeding

The committee should proceed by considering the statement of grounds for dismissal already formulated, and the faculty member's response written before the time of the hearing. If the faculty member has not requested a hearing, the committee should consider the case on the basis of the obtainable information and decide whether he should be removed; otherwise the hearing should go forward. The committee, in consultation with the president and the faculty member, should exercise its judgment as to whether the hearing should be public or private. If any facts are in dispute, the testimony of witnesses and other evidence concerning the matter set forth in the president's letter to the faculty member should be received.

The president should have the option of attendance during the hearing. He may designate an appropriate representative to assist in developing the case; but the committee should determine the order of proof, should normally conduct the questioning of witnesses, and, if necessary, should secure the presentation of evidence important to the case.

The faculty member should have the option of assistance by counsel, whose functions should be similar to those of the representative chosen by the president. The faculty member should have the additional procedural rights set forth in the 1940 *Statement of Principles on Academic Freedom and Tenure,* and should have the aid of the committee, when needed, in securing the attendance of witnesses. The faculty member or his counsel and the representative designated by the president should have the right, within reasonable limits, to question all witnesses who testify orally. The faculty member should have the opportunity to be confronted by all witnesses adverse to him. Where unusual and urgent reasons move the hearing committee to withhold this right, or where the witness cannot appear, the identity of the witness, as well as his

statements, should nevertheless be disclosed to the faculty member. Subject to these safeguards, statements may when necessary be taken outside the hearing and reported to it. All of the evidence should be duly recorded. Unless special circumstances warrant, it should not be necessary to follow formal rules of court procedure.

6. Consideration by Hearing Committee

The committee should reach its decision in conference, on the basis of the hearing. Before doing so, it should give opportunity to the faculty member or his counsel and the representative designated by the president to argue orally before it. If written briefs would be helpful, the committee may request them. The committee may proceed to decision promptly, without having the record of the hearing transcribed, where it feels that a just decision can be reached by this means; or it may await the availability of a transcript of the hearing if its decision would be aided thereby. It should make explicit findings with respect to each of the grounds of removal presented, and a reasoned opinion may be desirable. Publicity concerning the committee's decision may properly be withheld until consideration has been given to the case by the governing body of the institution. The president and the faculty member should be notified of the decision in writing and should be given a copy of the record of the hearing. Any release to the public should be made through the president's office.

7. Consideration by Governing Body

The president should transmit to the governing body the full report of the hearing committee, stating its action. On the assumption that the governing board has accepted the principle of the faculty hearing committee, acceptance of the committee's decision would normally be expected. If the governing body chooses to review the case, its review should be based on the record of the

previous hearing, accompanied by opportunity for argument, oral or written or both, by the principals at the hearing or their representatives. The decision of the hearing committee should either be sustained or the proceeding be returned to the committee with objections specified. In such a case the committee should reconsider, taking account of the stated objections and receiving new evidence if necessary. It should frame its decision and communicate it in the same manner as before. Only after study of the committee's reconsideration should the governing body make a final decision overruling the committee.

8. Publicity

Except for such simple announcements as may be required, covering the time of the hearing and similar matters, public statements about the case by either the faculty member or administrative officers should be avoided so far as possible until the proceedings have been completed. Announcement of the final decision should include a statement of the hearing committee's original action, if this has not previously been made known.

C. 1971 Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments

The Statement which follows was prepared by the Association's Committee A on Academic Freedom and Tenure. It was first published in somewhat different format as a draft report in the March, 1970, AAUP Bulletin, *with comments solicited from members, chapters, and conferences. It was adopted by the Council of the American Association of University Professors in April, 1971, and endorsed by the Fifty-seventh Annual Meeting as Association policy.*

Introduction

The steady growth in the number of institutions new to college and university traditions, and in the number of probationary faculty members, has underscored the need

for adequate procedures in reaching decisions on faculty renewals[1] and for the protection of the probationary faculty member against decisions either in violation of his academic freedom or otherwise improper. Related to this need has been a heightened interest in providing the faculty member with a written statement of reasons for a decision not to offer him reappointment or to grant him tenure. At the Association's Fifty-fifth Annual Meeting, held on April 30 and May 1, 1969, a motion was adopted urging Committee A

> . . . to consider adoption of the position that notice of nonreappointment of probationary faculty be given in writing and that it include the reasons for the termination of the appointment. In any allegation that the reasons are false, or unsupported by the facts, or violative of academic freedom or procedures, the proof should rest with the faculty member.

The position which the Annual Meeting urged Committee A to consider had been the primary topic of discussion at the December 14-15, 1968, meeting of the Committee A Subcommittee on Nontenured Faculty, and it was discussed at length again at the subcommittee's meeting on October 11, 1969, at the regular Committee A meetings of April 27-28 and October 29-30, and at a special meeting of Committee A on January 9-10, 1970. The present statement embodies the consensus arrived at during those meetings.

It has long been the Association's position, as stated in *The Standards for Notice of Nonreappointment,* that "notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should

---

[1] These procedures do not apply to special appointments, clearly designated in writing at the outset as involving only a brief association with the institution for a fixed period of time.

be given in writing." Although the Association has not attempted to discourage the giving of reasons, either orally or in writing, for a notice of nonreappointment, it has not required that reasons be given.

In considering this question, Committee A endeavored to appraise the advantages and disadvantages of the Association's present policy and the proposed policy in terms of the Association's traditional concern for the welfare of higher education and its various components, including probationary faculty members. The committee also examined the question of giving reasons in the context of the entire probationary period. As a result, this statement goes beyond the question of giving reasons to the more fundamental subject of general fairness in the procedures related to renewal or nonrenewal of term appointments and the granting of tenure.

STATEMENT

The Probationary Period: Standards and Criteria

The 1940 *Statement of Principles on Academic Freedom and Tenure* prescribes that "during the probationary period a teacher should have the academic freedom that all other members of the faculty have." A number of the nontenured faculty member's rights provide support for his academic freedom. He cannot, for example, be dismissed before the end of a term appointment except for adequate cause which has been demonstrated through academic due process—a right he shares with tenured members of the faculty. If he asserts that he has been given notice of nonreappointment in violation of academic freedom, he is entitled to an opportunity to establish his claim in accordance with Section 10 of Committee A's *Recommended Institutional Regulations*. He is entitled to timely notice of nonreappointment in accordance with

the schedule prescribed in the statement on *The Standards for Notice of Nonreappointment.*[2]

Lacking the reinforcement of tenure, however, the academic freedom of the probationary faculty member has depended primarily upon the understanding and support of his faculty colleagues, the administration, and professional organizations, especially the Association. In the 1966 *Statement on Government of Colleges and Universities,* the Association and other sponsoring organizations have asserted that "faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal." It is Committee A's view that collegial deliberation of the kind envisioned by the *Statement on Government* will minimize the risk both of a violation of academic freedom and of a decision which is arbitrary or based upon inadequate consideration.

Frequently the young faculty member has had no training or experience in teaching, and his first major research endeavor may still be uncompleted at the time he starts his career as a college teacher. Under these circumstances, it is particularly important that there be a probationary period—a maximum of seven years under the 1940 *Statement of Principles on Academic Freedom and Tenure*—

[2] The *Standards for Notice* are as follows:

(1) *Not later than March 1 of the first academic year of service,* if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

(2) *Not later than December 15 of the second academic year of service,* if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

(3) At least twelve months before the expiration of an appointment after two or more years in the institution.

before tenure is granted. Such a period gives the individual time to prove himself, and his colleagues time to observe and evaluate him on the basis of his performance in the position rather than on the basis only of his education, training, and recommendations.

Good practice requires that the institution (department, college, or university) define its criteria for reappointment and tenure and its procedures for reaching decisions on these matters. The 1940 *Statement of Principles* prescribes that "the precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated." Committee A also believes that fairness to the faculty member prescribes that he be informed, early in his appointment, of the substantive and procedural standards which will be followed in determining whether or not his appointment will be renewed or tenure will be granted.

We accordingly make the following recommendation:

1. *Criteria and Notice of Standards.* The faculty member should be advised, early in his appointment, of the substantive and procedural standards generally employed in decisions affecting renewal and tenure. Any special standards adopted by his department or school should also be brought to his attention.

The Probationary Period: Evaluation and Decision

The relationship of the senior and junior faculty should be one of colleagueship, even though the nontenured faculty member knows that in time he will be judged by his senior colleagues. Thus the procedures adopted for evaluation and possible notification of nonrenewal should not endanger this relationship where it exists, and should encourage it where it does not. The nontenured faculty member should have available to him the advice and assistance of his senior colleagues; and the ability of senior colleagues to make a sound decision on renewal or tenure

will be enhanced if an opportunity is provided for a regular review of the qualifications of nontenured faculty members. Total separation of the faculty roles in counseling and evaluation may not be possible and may at times be unproductive: for example, an evaluation, whether interim or at the time of final determination of renewal or tenure, can be presented in such a manner as to assist the nontenured faculty member as he strives to improve his performance.

Any recommendation regarding renewal or tenure should be reached by an appropriate faculty group in accordance with procedures approved by the faculty. Because it is important both to the faculty member and the decision-making body that all significant information be considered, he should be notified that a decision is to be made regarding renewal of his appointment or the granting of tenure and should be afforded an opportunity to submit material in writing which he believes to be relevant to that decision.

We accordingly make the following recommendations:

2. (a) *Periodic Review.* There should be provision for periodic review of the faculty member's situation during the probationary service.

2. (b) *Opportunity To Submit Material.* The faculty member should be advised of the time when decisions affecting renewal and tenure are ordinarily made, and he should be given the opportunity to submit material which he believes will be helpful to an adequate consideration of his circumstances.

Observance of the practices and procedures outlined above should minimize the likelihood of reasonable complaint if the nontenured faculty member is given notice of nonreappointment. He will have been informed of the criteria and procedures for renewal and tenure; he will have been counseled by faculty colleagues; he will have been given an opportunity to have all material relevant

to his evaluation considered; and he will have received a timely decision representing the view of faculty colleagues.

Notice of Reasons

With respect to giving reasons for a notice of nonreappointment, practice varies widely from institution to institution, and sometimes within institutions. At some, in accordance with the institution's regulations, the faculty member is provided with a written statement of the reasons. At others, generally at the discretion of the department chairman, he is notified of the reasons, either orally or in writing, if he requests such notification. At still others, no statement of reasons is provided even upon request, although information is frequently provided informally by faculty colleagues.

Resolving the question of whether a faculty member should be given a statement of reasons, at least if he requests it, requires an examination of the needs both of the institution and of the individual faculty member.

A major responsibility of the institution is to recruit and retain the best qualified faculty within its means. In a matter of such fundamental importance, the institution, through the appropriate faculty agencies, must be accorded the widest latitude consistent with academic freedom and the standards of fairness. Committee A recognizes that the requirement of giving reasons may lead, however erroneously, to an expectation that the decision-making body must justify its decision. A notice of nonreappointment may thus become confused with dismissal for cause, and under these circumstances the decision-making body may become reluctant to reach adverse decisions which may culminate in grievance procedures. As a result there is a risk that the important distinction between tenure and probation will be eroded.

To be weighed against these important institutional concerns are the interests of the individual faculty member.

He may be honestly unaware of the reasons for a negative decision, and the decision may be based on a judgment of shortcomings which he could easily remedy if informed of them. A decision not to renew an appointment may be based on erroneous information which the faculty member could readily correct if he were informed of the basis for the decision. Again, the decision may be based on considerations of institutional policy or program development which have nothing to do with the faculty member's competence in his field, and if not informed of the reasons he may mistakenly assume that a judgment of inadequate performance on his part has been made. In the face of a persistent refusal to supply the reasons, a faculty member may be more inclined to attribute improper motivations to the decision-making body or to conclude that its evaluation has been based upon inadequate consideration. If he wishes to request a reconsideration of the decision, or a review by another body, his ignorance of the reasons for the decision will create difficulties both in reaching a decision whether to initiate such a request and in presenting his case for reconsideration or review.

After careful evaluation of these competing concerns, Committee A has concluded that the reasons in support of the faculty member's being informed outweigh the countervailing risks. Committee A emphasizes that in reaching this conclusion it does not consider it appropriate to require that every notice of nonreappointment be accompanied by a written statement of the reasons for nonreappointment. It may not always be to the advantage of the faculty member to be informed of the reasons, particularly in writing. If he is informed of them, he can be placed under an obligation to divulge them to the appointing body of another institution if it inquires why he is leaving his present position. Similarly, a written record is likely to become the basis for continuing responses by his former institution to prospective appointing bodies and may thus jeopardize his chances for obtaining positions over an extended period.

At many institutions, moreover, the procedures of evaluation and decision may make it difficult, if not impossible, to compile a statement of reasons which precisely reflects the basis of the decision. When a number of faculty members participate in the decision, they may oppose a reappointment for a variety of reasons, few or none of which may represent a majority view. To include every reason, no matter how few have held it, in a written statement to the faculty member may misrepresent the general view and damage unnecessarily both the faculty member's morale and his professional future.

In many situations, of course, a decision not to reappoint will not reflect adversely upon the faculty member. An institution may, for example, find it necessary for financial or other reasons to restrict its offerings in a given department. A number of institutions appoint more faculty members than they expect to give tenure; at such institutions a limit has been placed on the number of faculty at each rank, and the acquisition of tenure depends not only upon satisfactory performance but also upon an opening in the ranks above instructor or assistant professor. Nonrenewal in these cases is not likely to be psychologically damaging or to suggest a serious adverse judgment.

In these situations, providing a statement of reasons, either written or oral, should pose no difficulty, and such a statement may in fact assist the faculty member in his search for a new position. In other situations, in spite of his awareness of the considerations cited above, the faculty member may ask to be advised of the reasons which contributed to his nonreappointment, and Committee A believes that he should be given such advice. It believes also that he should have the opportunity to request a reconsideration by the decision-making body.

We accordingly make the following recommendation:

3. *Notice of Reasons.* In the event of a decision not to renew his appointment, the faculty member should be in-

formed of the decision in writing, and, if he so requests, he should be advised of the reasons which contributed to that decision. He should also have the opportunity to request a reconsideration by the decision-making body.

Written Reasons

Having been given orally the reasons which contributed to his nonreappointment, the faculty member, to avoid misunderstanding, may request that they be confirmed in writing. He may wish to petition the appropriate faculty committee, in accordance with Section 10 of Committee A's *Recommended Institutional Regulations*, to consider an allegation that the reasons he was given violate his academic freedom, or that the primary reasons for the notice of nonreappointment were not stated and constitute a violation of his academic freedom. He may wish to petition a committee, in accordance with Section 15 of the *Recommended Institutional Regulations*, to consider a complaint that the decision resulted from inadequate consideration and was therefore unfair to him. He may feel that a written statement of reasons may be useful to him in pursuing his professional career.

If the department chairman or other appropriate institutional officer to whom the request is made feels that confirming the oral statement in writing may be damaging to the faculty member on grounds such as those cited earlier in this statement, Committee A believes that it would be desirable for him to explain the possible adverse consequences of confirming the oral statement in writing. If in spite of this explanation the faculty member continues to request a written statement, Committee A believes that his request should be honored.

We accordingly make the following recommendation:

4. *Written Reasons.* If the faculty member expresses a desire to petition the grievance committee (such as is described in Sections 10 and 15 of Committee A's *Rec-*

ommended Institutional Regulations), or any other appropriate committee, to use its good offices of inquiry, recommendation, and report, or if he makes the request for any other reason satisfactory to himself alone, he should have the reasons given in explanation of the nonrenewal confirmed in writing.

Review Procedures: Allegations of Academic Freedom Violations

The best safeguard against a proliferation of grievance petitions on a given campus is the observance of sound principles and procedures of academic freedom and tenure and of institutional government. Committee A believes that observance of the procedures recommended in this statement—procedures which would provide guidance to nontenured faculty members, help assure them of a fair professional evaluation, and enlighten them concerning the reasons contributing to key decisions of their colleagues—would constitute a further step in the achievement of harmonious faculty relationships and the development of well-qualified faculties.

Even with the best practices and procedures, however, faculty members will at times feel that they have been improperly or unjustly treated and may wish another faculty group to review a decision of the faculty body immediately involved. Committee A believes that fairness both to the individual and the institution requires that the institution provide for such a review when it is requested. A possible violation of academic freedom is of vital concern to the institution as a whole, and where a violation is alleged it is of cardinal importance to the faculty and the administration to determine whether substantial grounds for the allegation exist. The institution should also be concerned to see that decisions respecting reappointment are based upon adequate consideration, and provision should thus be made for a review of allegations by affected faculty members that the consideration has been inadequate.

Because of the broader significance of a violation of academic freedom, Committee A believes that the procedures to be followed in these two kinds of complaints should be kept separate. Section 10 of the *Recommended Institutional Regulations,* mentioned earlier in this statement, provides a specific procedure for the review of complaints that academic freedom has been violated.[3]

> If a faculty member on probationary or other nontenured appointment alleges that considerations violative of academic freedom significantly contributed to a decision not to reappoint him, his allegation will be given preliminary consideration by the [insert name of committee], which will seek to settle the matter by informal methods. His allegation shall be accompanied by a statement that he agrees to the presentation, for the consideration of the faculty committees, of such reasons and evidence as the institution may allege in support of its decision. If the difficulty is unresolved at this stage, and if the committee so recommends, the matter will be heard in the manner set forth in Regulations 5 and 6, except that the faculty member making the complaint is responsible for stating the grounds upon which he bases his allegations, and the burden of proof shall rest upon him. If he succeeds in establishing a *prima facie* case, it is incumbent upon those who made the decision not to reappoint him to come forward with evidence in support of their decision.

We accordingly make the following recommendation:

5. *Petition for Review Alleging an Academic Freedom Violation* (Section 10, *Recommended Institutional Regu-*

[3] Because the *Recommended Institutional Regulations* remain under review by Committee A, faculties processing complaints under Sections 10 and 15 may wish to secure the further advice of the Association's Washington Office.

lations). Insofar as the petition for review alleges a violation of academic freedom, the functions of the committee which reviews the faculty member's petition should be the following:

(a) To determine whether or not the notice of nonreappointment constitutes on its face a violation of academic freedom.

(b) To seek to settle the matter by informal methods.

(c) If the matter remains unresolved, to decide whether or not the evidence submitted in support of the petition warrants a recommendation that a formal proceeding be conducted in accordance with Sections 5 and 6 of the *Recommended Institutional Regulations*, with the burden of proof resting upon the complaining faculty member.

Review Procedures: Allegations of Inadequate Consideration

Complaints of inadequate consideration are likely to relate to matters of professional judgment, where the department or departmental agency should have primary authority. For this reason, Committee A believes that the basic functions of the review committee should be to determine whether adequate consideration was given to the appropriate faculty body's decision and, if it determines otherwise, to request reconsideration by that body.

It is easier to state what the standard "adequate consideration" does not mean than to specify in detail what it does. It does not mean that the review committee should substitute its own judgment for that of members of the department on the merits of whether the candidate should be reappointed or given tenure. The conscientious judgment of the candidate's departmental colleagues must prevail if the invaluable tradition of departmental auton-

omy in professional judgments is to prevail. The term "adequate consideration" refers essentially to procedural rather than substantive issues: Was the decision conscientiously arrived at? Was all available evidence bearing on the relevant performance of the candidate sought out and considered? Was there adequate deliberation by the department over the import of the evidence in the light of the relevant standards? Were irrelevant and improper standards excluded from consideration? Was the decision a *bona fide* exercise of professional academic judgment? These are the kinds of questions suggested by the standard "adequate consideration."

If in applying this standard the review committee concludes that adequate consideration was not given, its appropriate response should be to recommend to the department that it assess the merits once again, this time remedying the inadequacies of its prior consideration.

An acceptable review procedure, representing one procedural system within which such judgments may be made, is outlined in Section 15 of the *Recommended Institutional Regulations,* as follows:

> If a faculty member feels that he has cause for grievance in any matter other than dismissal proceedings —such matters as salaries, assignment of teaching duties, assignment of space or other facilities, and propriety of conduct—he may petition the elected faculty grievance committee [here name the committee] for redress. The petition shall set forth in detail the nature of the grievance, and shall state against whom the grievance is directed. It shall contain any factual or other data which the petitioner deems pertinent to his case. The committee will have the right to decide whether or not the facts merit a detailed investigation. Submission of a petition will not automatically entail investigation or detailed consideration thereof. The committee may seek to bring about

a settlement of the issue satisfactory to the parties. If in the opinion of the committee such a settlement is not possible or is not appropriate, the committee will report its findings and recommendations to the petitioner and to the appropriate administrative officer and faculty body [here identify], and the petitioner will, at his request, be provided an opportunity to present his case to them.

The grievance committee will consist of three [or some other number] members of the faculty who have tenure and who are elected at large. No department chairman or administrative officer shall serve on the committee.

We accordingly make the following recommendation:

6. *Petition for Review Alleging Inadequate Consideration* (Section 15, *Recommended Institutional Regulations*). Insofar as the petition for review alleges inadequate consideration, the functions of the committee which reviews the faculty member's petition should be the following:

(a) To determine whether the decision of the appropriate faculty body was the result of adequate consideration in terms of the relevant standards of the institution, with the understanding that the review committee should not substitute its judgment on the merits for that of the faculty body.

(b) To request reconsideration by the faculty body when the committee believes that adequate consideration was not given to the faculty member's qualifications. (In such instances, the committee should indicate the respects in which it believes the consideration may have been inadequate.)

(c) To provide copies of its report and recommendation to the faculty member, the faculty body, and the president or other appropriate administrative officer.

FILE COPY

FILED
OCT 7 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 70-36

CHARLES R. PERRY, *et al.*,
Petitioners,

v.

ROBERT P. SINDERMANN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

DAVID RUBIN
Deputy General Counsel
National Education Association
1201 - 16th Street, N. W.
Washington, D. C. 20036

RICHARD J. MEDALIE
Epstein, Friedman and Duncan
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorneys for the National Education Association

Washington, D. C. THIEL PRESS 202 393-0625

INDEX

	Page
INTEREST OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE*	2
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The History of Reprisals Against Teachers Who Have Exercised Their Constitutional Rights as Citizens Compels Reaffirmation by This Court That a Nontenured Teacher Cannot Be Denied Reemployment for Exercising Such Rights	4
II. This Court Should Require Procedural Due Process Safeguards To Protect Nontenured Teachers in the Exercise of Their Constitutional Rights and To Prevent Arbitrary Termination of Their Employment	13
A. Procedural Due Process Is Necessary To Provide "Bulwarks" Against the Infringement of Teachers' Rights	13
B. Procedural Due Process Is Necessary To Protect a Teacher's Professional Reputation and His Ability To Pursue His Chosen Occupation	16
C. Empirical Evidence Shows That Due Process Procedures Would Impose No Significant Burden on School Administrators and Boards	18
CONCLUSION	23
APPENDIX:	
School-Board Procedures Upon Nonrenewal of Teachers' Contracts	1a

CITATIONS

Cases:

Armstead v. Starkville Mun. Sep. School Dist., C.A. No. EC 70-51-S, N.D. Miss., July 27, 1971	9-10
Chase v. Fall Mount. Reg. School Dist., C.A. No. 3112, D.N.H., July 28, 1971	10, 14

Page

Culross v. Weaver, C.A. No. 71-C-75, W.D. Wisc., July 23, 1971 21-22

Downs v. Conway School Dist., C.A. No. LR-70-C-160, E.D. Ark., June 23, 1971 . . . . . 10, 15

Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971) 2, 18-19, 22

Fenton v. Boston School Comm., 401 U.S. 929 (1971), *dismissing appeal from and denying cert. to* DeCanio v. School Comm. of Boston, 260 N.E.2d 676 (Mass. 1970) 2

Fooden v. Board of Govs., 268 N.E.2d 15 (Ill. 1971), *modified upon denial of rehearing*, Mar. 31, 1971, *petition for cert. filed*, 40 U.S.L.W. 3002 (U.S. June 29, 1971) (No. 1901, *renumbered*, No. 70-354) 2

Friedman v. Union Free School Dist. No. 1, 314 F.Supp. 223 (E.D.N.Y. 1970) 10

Goldberg v. Kelly, 397 U.S. 254 (1970) 21

Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) 15

Jackson v. United States, 428 F.2d 844 (Ct. Cl. 1970) 10

Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967) 14

Jones v. Hopper, 397 U.S. 991 (1970), *denying cert. to* 410 F.2d 1323 (10th Cir. 1969) 2

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 3, 13

Los Angeles Teachers Union v. Los Angeles City Bd. of Educ., 78 Cal. Rptr. 723, 455 P.2d 827 (1969) 10

Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970) 10

McDowell v. State of Texas, Dkt. No. 30,363, 5th Cir. (pending on appeal *en banc*) 2

McGee v. Richmond Unified School Dist., 306 F.Supp. 1052 (N.D. Cal. 1969) 10

O'Neil v. Board of Educ., Dkt. No. 693-70, 10th Cir. (pending on appeal *en banc*) 2

Orr v. Trinter, 318 F.Supp. 1041 (S.D. Ohio 1970), *reversed*, Dkt. No. 20721, 6th Cir., June 16, 1971, *petition for cert. filed*, 40 U.S.L.W. 3081 (U.S. Aug. 18, 1971) (No. 71-249) 2, 16-17

Page

Pickering v. Board of Educ., 391 U.S. 563 (1968) 3, 5, 9, 12, 13, 22

Puentes v. Board of Educ., 24 N.Y. 2d 996, 250 N.E.2d 232 (1969), *on remand from* 392 U.S. 653 (1968) 10

Rainey v. Jackson State Coll., 435 F.2d 1031 (5th Cir. 1970) 10

Roberts v. Lake Central School Corp., 317 F.Supp. 63 (N.D. Ind. 1970) 10

Roth v. Board of Regents, 310 F.Supp. 972 (W.D. Wisc. 1970), *affirmed*, 40 U.S.L.W. 2060 (7th Cir. July 1, 1971), *petition for cert. filed*, 40 U.S.L.W. 3069 (U.S. Aug. 3, 1971) (No. 71-162) 2, 13-14

Shirck v. Thomas, Dkt. No. 18790, 9th Cir., Sept. 2, 1971, *reversing* 315 F.Supp. 1124 (S.D. Ill. 1970) 14

Wieman v. Updegraff, 344 U.S. 183 (1952) 3, 12, 13

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 16

Statutes:

Various state tenure statutes 18, 19 n.37, 20 n.39

Other Materials:

ACLU, *Academic Freedom, Academic Responsibility, Academic Due Process in Institutions of Higher Learning* (rev. ed. 1966) 9

H.K. Beale, *Are American Teachers Free?* (1936) 5-8, 10-11, 14-15

H.K. Beale, *A History of Freedom of Teaching in American Schools* (1941) 5-8, 11

C. Byse & L. Joughin, *Tenure in American Higher Education* (1959) 12

Educational Research Service, *School Bond and Budget or Tax Rate Referendums, 1970*, ERS Inf. Aid No. 10, Aug., 1971 16

Eliot, *Academic Freedom* (1907) 13

R. Hofstadter & W.P. Metzger, *The Development of Academic Freedom in the United States* (1955) 6, 7, 11, 13

Page

O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 Sup. Ct. Rev. 161 14

NEA, *The Problem of Teacher Tenure*, 2 NEA Research Bull. 143 (1924) 12

NEA Research Div., *Provisions in Tenure Laws for Impartial Hearing Tribunals*, 49 NEA Research Bull. 20 (1971) 22

NEA Research Div., *School-Board Procedures Upon Nonrenewal of Teachers' Contracts* (Sept. 1971) (Research Memo 1971-27) 4, 17, 21, 22, 1a-8a

NEA Research Div., *Statutory Hearing Rights of Nontenured Teachers*, 49 NEA Research Bull. 17 (1971) 20

NEA Research Div., *Teacher Job Shortage Ahead*, 49 NEA Research Bull. 69 (1971) 16

NEA Research Div., *Teacher Tenure and Contracts* (1971) (Research Rep. 1971-R3) 19-20

H. Ziegler, *The Political Life of American Teachers* (1967) . . 9, 11

IN THE

Supreme Court of the United States

No. 70-36

CHARLES R. PERRY, *et al.*,
Petitioners,

v.

ROBERT P. SINDERMANN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

The National Education Association of the United States (NEA), with the consent of the parties, appears before this Court as *amicus curiae* in the present case.[1] When this case was pending before this Court on petition for a writ of certiorari, NEA appeared as *amicus curiae* to urge that the writ of certiorari be granted. At the present stage of the proceedings, NEA appears, as it did in the court below, as *amicus curiae* in support of the position taken by respondent.

[1] Letters from counsel for each of the parties, consenting to NEA's participation as *amicus curiae*, have been filed with the Clerk of this Court.

INTEREST OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE*

NEA was founded in 1857 and chartered as a nonprofit corporation by act of Congress in 1906. Its membership includes more than one million professional educators, many of whom are nontenured teachers.

NEA has long sought protection for the constitutional rights and academic freedom of educators, including due process in matters pertaining to their appointment, promotion, dismissal and nonretention. To this end, NEA has participated as *amicus curiae* before this Court and before other federal and state courts in other teacher termination cases raising First Amendment[2] and procedural due process issues[3] comparable to those raised in the present case. For these reasons, NEA appears here as *amicus curiae* in support of the respondent.

---

[2] *See* Jones v. Hopper, 397 U.S. 991 (1970), *denying cert. to* 410 F.2d 1323 (10th Cir. 1969); Fenton v. Boston School Comm., 401 U.S. 929 (1971), *dismissing appeal from and denying cert. to* DeCanio v. School Comm. of Boston, 260 N.E.2d 676 (Mass. 1970); O'Neil v. Board of Educ., Dkt. No. 693-70, 10th Cir. (pending on appeal *en banc*); Fooden v. Board of Govs., 268 N.E.2d 15 (Ill. 1971), *modified upon denial of rehearing*, Mar. 31, 1971, *petition for cert. filed*, 40 U.S.L.W. 3002 (U.S. June 29, 1971) (No. 1901, *renumbered*, No. 70-354).

[3] *See* Orr v. Trinter, 40 U.S.L.W. 3081 (U.S., filed Aug. 18, 1971) (No. 71-249), *on petition for cert. from* Dkt. No. 20721, 6th Cir., June 16, 1971, *reversing* 318 F. Supp. 1041 (S.D. Ohio 1970); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); Roth v. Board of Regents, 40 U.S.L.W. 2060 (7th Cir. July 1, 1971), *affirming* 310 F. Supp. 972 (W.D. Wisc. 1970), *petition for cert. filed*, 40 U.S.L.W. 3069 (U.S. Aug. 3, 1971) (No. 71-162); McDowell v. State of Texas, Dkt. No. 30,363, 5th Cir. (pending on appeal *en banc*).

INTRODUCTION AND SUMMARY OF ARGUMENT

NEA is in agreement with the legal positions presented in respondent's brief. Accordingly, this *amicus* brief is limited to the presentation of relevant historical materials and recent empirical research data which should be of assistance to this Court in considering the constitutional issues presented.

In Part I of its argument, NEA shows that the present case is representative of a longstanding and continuing pattern of retaliation against teachers for exercising basic constitutional rights. Historical data shows that, from the earliest days of our nation through the present day, school authorities on all levels have felt free to terminate the employment of teachers for espousing unpopular causes offensive to the school administration, to the prevailing view in the community, or to powerful political or economic interests.

Survey data have shown that many teachers have been fearful of exercising even the most elementary rights of citizenship. The consequences extend beyond the curtailment of fundamental rights of the large number of individuals involved. All of society suffers when educators are denied "that free play of the spirit which all teachers ought especially to cultivate and practice...." *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion). Nor is it in the public interest to deny full participation in public debate to teachers who have insights and knowledge to contribute on the critical issues of the day, particularly on those relating to educational policy. *See Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968). Accordingly, this Court should hold that the renewal of respondent's contract could not be conditioned upon the relinquishment of his constitutional rights. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967).

In Part II, NEA addresses particular aspects of the procedural due process issue. It first shows that, if a school system terminates *one* teacher's employment without an opportunity for defense, there is an inevitable chilling effect

on free expression by *all* teachers in that system. Procedural due process has the prophylactic effect of making school authorities accountable for their actions, thereby discouraging and preventing arbitrary action. NEA further provides empirical data from its Research Division's recent study of *School-Board Procedures Upon Nonrenewal of Teachers' Contracts* (Sept. 1971) (Research Memo 1971-27) supporting respondent's argument that procedural due process is necessary to protect a teacher's professional reputation and his ability to pursue his chosen occupation. Finally, NEA analyzes state statutory provisions and empirical data from recent research studies to show that due process procedures would impose no significant administrative burden on school authorities.

ARGUMENT

I. THE HISTORY OF REPRISALS AGAINST TEACHERS WHO HAVE EXERCISED THEIR CONSTITUTIONAL RIGHTS AS CITIZENS COMPELS REAFFIRMATION BY THIS COURT THAT A NONTENURED TEACHER CANNOT BE DENIED REEMPLOYMENT FOR EXERCISING SUCH RIGHTS.

Respondent Sindermann alleges that his contract was not renewed in retaliation for his activity in favor of two causes, and his support of legislation necessary to achieve those goals. In both cases, the Board of Regents of Odessa Junior College maintained positions contrary to those espoused by Sindermann. The Board's opposition to the two causes supported by Sindermann and its attempts to silence him as a source of irritation fall within the historical pattern of suppression by school administrations of the views of dissident faculty members.

Sindermann's first aim was to secure to the teachers of the public colleges of Texas, through legislative enactment, the protections of tenure and academic freedom. Obviously, such legislation was opposed to a vested interest of the Board—the arbitrary discretion to withhold renewal of the

contract of a teacher for any reason or no reason. The bill in question would have limited the Board's power. Board members, like superintendents of schools, "being human, cherish their power over others and know that adequate tenure laws will deprive them of the more arbitrary exercises of it."[4]

Sindermann's second project was to obtain the elevation of Odessa Junior College to full four-year status. This, too, clearly conflicted with the stated policy of the Board. It is not clear from the record why the Board opposed four-year status for the college, but economic interests appear to have played a role. Not only the Board of Regents, but also the chambers of commerce of Odessa and Midland appear to have taken stands contrary to Sindermann's goals (*see* Resp. Br. App. 16a-17a).

History shows many instances of a teacher silenced through arbitrary dismissal or the threat of dismissal when his public comments endangered the interests or philosophies of school authorities or the economic or political forces having influence or control over the schools. A few years ago, this Court confronted such a case in *Pickering v. Board of Education*, 391 U.S. 563 (1968). The *Pickering* case and the present case are only recent manifestations of a long-standing and continuing pattern of retaliation against teachers for exercising basic constitutional rights.

From the earliest days of our nation, teachers have been at the mercy of school and university boards and administrations that have felt free to terminate their employment for embracing unpopular causes offensive to the school authorities, to the prevailing view in the community, or to powerful

---

[4]H.K. Beale, *Are American Teachers Free?* 475 (1936) (hereinafter referred to as "I Beale"). This work and Professor Beale's companion volume, *A History of Freedom of Teaching in American Schools* (1941) (hereinafter referred to as "II Beale") are parts XII and XVI, respectively, of the *Report of the Commission on the Social Studies* of the American Historical Association.

political or economic interests.[5] This practice achieved doctrinal support during the Jacksonian period when the "spoils system" became an entrenched feature of American politics. The Jacksonian democrats believed that, since all men were politically equal, any man could fill any office or position. This concept was quickly adapted to the field of education:

> "Training for teaching was as unnecessary as training for political office. Political appointments were rewards for friendship or for service that had nothing to do with qualification for the tasks. Teaching, too, came to be looked upon as the perquisite of 'worthy' members of the community, who needed support and had powerful friends. . . . There was no reason why a place so acquired should not again be taken from a man when he lost public approval. A teacher employed under these terms could scarcely attain a professional attitude that would make him free."[6]

Acceptance of the spoils system in education was bipartisan in nature. For example, at Kansas State Agricultural College, the state-wide victory of Democrats and Populists in 1896 resulted in the termination of all faculty contracts. Many of the professors were rehired, but the Populist victors staffed the presidency and the department of economics with men of acceptable ideologies. When, in 1899, the Republicans returned to power, they recaptured these prizes.[7]

Virtually any issue on which men might disagree could underlie a teacher's termination if the disagreement was between him and his superiors or his views conflicted with powerful interests controlling the schools. Before the Civil War, teachers in the South incurred dismissal for questioning the institution of slavery.[8] In 1859, for example, the entire

---

[5] *See, e.g.*, I Beale 464-65; II Beale 60, 149, 203, 228.

[6] II Beale 75.

[7] *See* R. Hofstadter & W.P. Metzger, *The Development of Academic Freedom in the United States* 424-25 (1955) (hereinafter referred to as "Hofstadter & Metzger").

[8] *See* II Beale 145-50.

faculty of Berea School in Kentucky was driven out for advocating abolitionism.[9] Following the Civil War, when business interests gained control of education in the South, a teacher's criticism of the "new industrial slavery" was no less hazardous to his employment.[10]

Northern business interests also sought to prevent discussion of the abuses of industrialization. For example, the liberal remarks of a professor at the University of Chicago about the Pullman strike embarrassed the university's president, who complained: "It is hardly safe for me to venture into any of the Chicago clubs." The contract of the offender was not renewed at year's end without a hearing or the specification of charges.[11]

The question of free silver was another issue on which a professor's orthodoxy determined his longevity. Near the turn of the century, the president of Brown University was offered the option of accepting the trustees' views on free silver or resigning.[12] The issue of academic freedom in this Hobson's choice was ignored by the press. Commented the *New York Mail and Express*: "'This was not a blow at free speech, but a recognition of the absurdity of a free-silver champion drawing a salary from a sound-money corporation for teaching the students that which the supporters of the university condemned as pernicious and dangerous.'"[13] A generation later, a teacher in Colorado was forced to sign, contrary to her convictions, a petition in favor of free silver under threat of dismissal.[14]

During World War I, there were wholesale attempts to purge from all schools those teachers who even suggested opposition to the war, support for Germany, or pacifism.

---

[9] II Beale 149.

[10] I Beale 132-33.

[11] Hofstadter & Metzger 427-28.

[12] II Beale 229.

[13] Quoted at *id.*

[14] I Beale 141-42.

Many teachers were dismissed or denied promotion because their support of the war was insufficiently ardent.[15]

In the depression era, teachers felt that, if they did not conform, if they expressed their own opinions, if they criticized the authorities, or if they incurred the slightest official displeasure, they were marked for dismissal or non-renewal—and destined to enter the ranks of the unemployed—when the next "economy" move came.[16]

Between world wars, when the spectre of communism and radicalism haunted America, teachers who were suspected of even the slightest divergence from patriotic orthodoxy were in danger of being purged from the system. "In Centralia, Washington, the School Board . . . barred from the schools all persons whom the Superintendent did not deem 'one-hundred per cent Americans.'"[17] In Cleveland, the supervisor of the social science curriculum in the public schools, described by the Superintendent as "'a perfect corker of a teacher,'" was nevertheless not reappointed. His transgression had been to remark, during an otherwise anti-Soviet speech at a hotel luncheon served by strikebreakers, that "among the liberties that did not exist in Russia was the liberty of being served by strike-breakers in a leading hotel."[18]

A comparable hysteria arose during the McCarthy era in the early and mid-1950's. The search for alleged domestic communist conspiracies quickly extended to the public schools:

> "Taking advantage of this outbreak of fear, experienced right wing leaders distributed vast amounts of literature claiming that most teachers and textbooks were advocates of socialism. A substantial number of public school teachers were fired, many of them

[15] *See* 1 Beale 25-35.

[16] II Beale 267. "Economy" is equally likely to serve as a subterfuge for a reprisal against nonconforming teachers in the present era of school budget austerity.

[17] I Beale 100.

[18] I Beale 150-51.

summarily on the basis of unsubstantiated and frequently anonymous accusations of disloyalty."[19]

The fear generated had an obvious chilling effect on teachers' free expression:

> "There was a definite decline in intellectual and academic freedom. . . . Many teachers withdrew from participation in social, political and economic associations and discussions. Some admitted they resorted to precautionary devices in classrooms and in their writings to allay criticism, censure and the threat of dismissal. . . ."[20]

Pressures akin to those of the McCarthy era continued to inhibit teachers during the 1960's. The ACLU identified the source of these influences as "self-constituted 'patriotic' societies and groups":

> "College teachers once more are being criticized for adopting and supporting so-called controversial positions, personally and professionally. They are being accused of aiding and abetting students who are regarded as rebels. Demands for punishment and dismissal of teachers are becoming frequent and are sometimes heeded by college administrators."[21]

In recent years, as the findings of courts confirm, teachers continue to be dismissed, suspended or not reemployed because of their criticism of school authorities. In *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), a teacher was dismissed for writing a letter to a newspaper editor attacking the school board's handling of proposals to raise new school revenues and its allocation of resources between educational and athletic programs. In *Armstead v. Starkville Mun. Sep. School Dist.*, C.A. No. EC 70-51-S, N.D. Miss., July 27, 1971, a black teacher was not reemployed because she cir-

---

[19] H. Ziegler, *The Political Life of American Teachers* 121 (1967).

[20] ACLU, *Academic Freedom, Academic Responsibility, Academic Due Process in Institutions of Higher Learning* 4 (rev. ed. 1966).

[21] *Id.* at 5.

culated documents criticizing alleged racial discrimination by school authorities against black educators. In *Puentes v. Board of Educ.*, 24 N.Y.2d 996, 250 N.E.2d 232 (1969), *on remand from* 392 U.S. 653 (1968), a high school teacher was suspended without pay for distributing to his fellow teachers copies of a letter he had written to his school board critical of the board's failure to renew the contract of a probationary teacher. In *Downs v. Conway School Dist.*, C.A. No. LR-70-C-160, E.D. Ark., June 23, 1971, a teacher's contract was not renewed because she exercised rights of free speech and petition in criticizing various policies of the school administration. In *Roberts v. Lake Central School Corp.*, 317 F. Supp. 63, 65 (N.D. Ind. 1970), a teacher's contract was not renewed because of his criticism of the school administration during collective negotiations. A similar fate befell a teacher in *Chase v. Fall Mountain Regional School Dist.*, C.A. No. 3112, D.N.H., July 28, 1971. In *McGee v. Richmond Unified School Dist.*, 306 F. Supp. 1052, 1053 (N.D. Cal. 1969), three nontenured school community workers were denied reemployment because of their signatures on a petition urging defeat of a limited tax increase sought by the school board because the board "had not addressed itself to the needs of the black community in its campaign." *See also Jackson v. United States*, 428 F.2d 844, 846 (Ct. Cl. 1970); *Los Angeles Teachers Union v. Los Angeles City Board of Educ.*, 78 Cal. Rptr. 723, 455 P.2d 827 (1969); *Lucas v. Chapman*, 430 F.2d 945, 948 (5th Cir. 1970); *Friedman v. Union Free School Dist. No. 1*, 314 F. Supp. 223 (E.D. N.Y. 1970); *Rainey v. Jackson State Coll.*, 435 F.2d 1031 (5th Cir. 1970).

Surveys have shown that many teachers have been fearful of exercising even the most elementary rights of citizenship, such as criticizing the President or exposing local corruption.[22] However limited the teacher's freedom to express

[22] In San Francisco a principal was dismissed for providing a grand jury with evidence of school graft. I Beale 356. *See also* I Beale 82. Beale notes that the survey he conducted indicated that "[c]riticism of the Government is dangerous. One teacher out of three was afraid

such views in class, "[t]here is much less freedom in advocating these same things outside of class. . . ."[23] Teachers are particularly inhibited from publicly expressing criticism of local government officials. Only 58 per cent of those in a recent survey considered this a proper activity in which to engage, suggesting that teachers are wary of offending those in a position to interfere with the continuity of their employment.[24] Thus, a profession ideally intended to stimulate thought and the exchange of ideas is apparently bartering its birthright for security:

> "Indifference to civic problems and general colorlessness are assets in seeking a teaching position, unless one can be conventional in his civic views. This is all significant not only for its effect upon the choice of teachers but for its important though unconscious influence upon the views and conduct of those who do get chosen for teaching positions."[25]

As a consequence of the stifling of freedom within the teaching profession, those to whom the rights of free expression are of indispensable importance—those likely to be our most effective teachers—may well avoid the teaching profes-

---

even to criticize President Hoover for using the army to drive the bonus men out of Washington or to accuse state officials of corruption. It is more dangerous, however, to express censure of the President of the United States on other grounds, or of local courts for unjust decisions, or of local officials for corruption." II Beale 240.

[23] II Beale 242.

[24] H. Zeigler, *The Political Life of American Teachers* 97 (1967).

[25] I Beale 521. Under these circumstances, one may doubt whether the following assessment of the condition of unprotected professors at American universities in the nineteenth century has any less validity today (Hofstadter & Metzger 232):

> "The least enterprising and self-assertive, often the least able, members of an inferior faculty were those most likely to remain docile in their jobs under intolerable pressures. Any profession is in a bad way when its members can seek freedom most effectually by leaving it. . . . Professors suffered, but their students and the community often bore the greater share of the loss."

sion entirely. Almost fifty years ago, NEA, seeking to encourage the passage of tenure legislation, expressed this very concern. It noted that, in a series of politically motivated teacher dismissals, "the hazards of the teaching profession have been emphasized, the work of the teacher discounted and fine, highminded youth discouraged from entering it."[26]

It is of obvious importance that "society may have the benefit of honest judgment and independent criticism [by teachers] which otherwise might be withheld because of fear of offending a dominant social group or transient social attitudes."[27] Mr. Justice Frankfurter recognized this ideal in his concurring opinion in *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952):

> "It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. . . . They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them."

Of comparable importance to the community is to encourage teachers to participate in public debate. Teachers have insights and knowledge to contribute to the issues of the day, particularly those relating to educational policy. As this Court recognized in *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968):

> "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."

---

[26] NEA, *The Problem of Teacher Tenure*, 2 NEA Research Bull. 137, 145 (1924).

[27] C. Byse & L. Joughin, *Tenure in American Higher Education* 4 (1959).

For the foregoing reasons, this Court should reaffirm its decisions, and uphold the conclusion of the court below, that school authorities may not refuse reemployment to a teacher—whether tenured or non-tenured—in retaliation for the exercise of a constitutional right. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

II. THIS COURT SHOULD REQUIRE PROCEDURAL DUE PROCESS SAFEGUARDS TO PROTECT NONTENURED TEACHERS IN THE EXERCISE OF THEIR CONSTITUTIONAL RIGHTS AND TO PREVENT ARBITRARY TERMINATION OF THEIR EMPLOYMENT.

A. Procedural Due Process Is Necessary To Provide "Bulwarks" Against the Infringement of Teachers' Rights.

The lack of procedural safeguards against the arbitrary termination of a teacher's employment has a chilling effect upon the teaching community. If a school system is free to terminate a teacher's employment without affording him a readily available opportunity to defend himself in a fair hearing, few in the academic community will be willing to indulge in "that free play of the spirit which all teachers ought especially to cultivate and practice. . . ." *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion); *see, e.g., Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968).

In 1907, President Charles W. Eliot of Harvard stated in his Phi Beta Kappa address on *Academic Freedom* (at p. 2) that "so long as . . . boards of trustees of colleges and universities claim the right to dismiss at pleasure all the officers of the institutions in their charge, there will be no security for the teachers' proper freedom. . . ."[28] Recently, the Seventh Circuit voiced similar recognition that the requirement of a hearing for a nontenured teacher on the proposed nonrenewal of his contract "serves as a prophylactic

[28] Quoted at Hofstadter & Metzger 398.

against non-retention decisions improperly motivated by exercise of protected rights." *Roth v. Board of Regents*, 40 U.S.L.W. 2060 (7th Cir. July 1, 1971), *petition for cert. filed*, 40 U.S.L.W. 3069 (U.S. Aug. 3, 1971) (No. 71-162).[29]

School officials accustomed to wielding arbitrary power will think twice before taking improperly motivated actions which they know will be exposed to public scrutiny. A requirement of a fair hearing promotes accountability by forcing school officials to act responsibly and with justification based on the teacher's record before moving to deprive him of his livelihood.[30]

An example of the arbitrary way in which school authorities may act to terminate a teacher's employment was provided in *Chase v. Fall Mount. Reg. School Dist.*, C.A. No. 3112, D. N.H., July 28, 1971, where a teacher was denied reemployment as the result of unsubstantiated rumors and complaints which the board did not bother to investigate or verify (*see* Resp. Br. 37 n.22).

A similar case in which a board acted on the basis of mere complaints without further investigation is recounted by Professor Beale:

---

[29] This Court should bear in mind that the present case is not typical. It is rare that school authorities manifest the degree of candor present here. A fair reading of the college's press release (A. 12-23) lends a high degree of credence to Sindermann's allegations that petitioners refused to renew his contract in retaliation for "his exercise of First and Fourteenth Amendment rights of expression, association and petition" (A. 186). In contrast, in most contract nonrenewal cases arising in the courts, the school authorities either have given no reasons or have provided reasons allegedly pretextual in nature, serving to mask constitutionally impermissible reasons. *See, e.g., Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967). Or the reasons given may be challenged as arbitrary or wholly without factual basis. *See, e.g., Shirck v. Thomas*, Dkt. No. 18790, 7th Cir., Sept. 2, 1971, *reversing* 315 F. Supp. 1124 (S.D. Ill. 1970).

[30] *Cf.* O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 Sup. Ct. Rev. 161, 184-90.

> "When . . . [the teacher's] reappointment came up . . ., several members of the Board raised the question why they should keep a man about whom there was discussion and criticism. The Board did not investigate to see if there was valid ground for criticism; it felt the criticism itself was sufficient reason for dismissal."[31]

In explaining his vote for nonrenewal, one member of the Board stated: "'The other men said they heard complaints and I took their word for it.'"[32] This nonrenewal occurred in a rural area to which the state tenure law did not apply. Therefore, this procedure was "legal" as well as "customary."[33]. *See also Downs v. Conway School Dist.*, C.A. No. LR-70-C-160, E.D. Ark., June 23, 1971, in which the court in condemning the arbitrary nonrenewal of a teacher's contract for the exercise of constitutionally protected rights noted the "highly malevolent attitude" of the defendant school officials (Slip Op. 19).

It is clear from these examples that, as the Fifth Circuit noted in *Hornsby v. Allen*, 326 F.2d 605, 610 (1964), "absolute and uncontrolled discretion invites abuse." As that court stated (*id.*):

> "The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process. . . ."

---

[31] I Beale 157.

[32] Quoted at I Beale 156.

[33] I Beale 156 n. 135.

B. Procedural Due Process Is Necessary To Protect a Teacher's Professional Reputation and His Ability To Pursue His Chosen Occupation.

In *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), this Court held that "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Nonrenewal of a teacher's contract adversely affects his professional reputation and his ability to pursue his profession. This is especially true today when a teacher whose employment is under any cloud is at a severe competitive disadvantage as a result of a burgeoning teacher surplus[34] and the increasing tendency of communities faced with proliferating budgetary demands to curtail educational outlays.[35]

As respondent has noted (Resp. Br. 38-41), courts and educators alike have recognized the harm caused a nontenured teacher by the nonrenewal of his contract. In addition to the cases cited by respondent, NEA directs the Court's attention to *Orr v. Trinter*, 318 F.Supp. 1041 (S.D. Ohio 1970), *reversed*, Dkt. No. 20721, 6th Cir., June 16, 1971, *petition for cert. filed*, 40 U.S.L.W. 3081 (U.S. Aug. 18, 1971)(No. 71-249). The district court in *Orr* characterized the protectible interests of the nontenured teacher involved as "professional standing and reputation" (318 F.Supp. 1045) and the "ability to pursue [a] chosen profession" (*id.* at 1046). These interests are "separate and apart from any interest in a particular job" (*id.* at 1045) and "[i]ndisputably" are in danger of being damaged when a contract is not renewed (*see id.* at 1046). On the basis of this analysis, the court held (*id.*):

---

[34] *See* NEA Research Div., *Teacher Job Shortage Ahead*, 49 NEA Research Bull. 69 (1971).

[35] *See* Educational Research Service, *School Bond and Budget or Tax Rate Referendums, 1970*, ERS Inf. Aid No. 10, Aug., 1971.

> "[T]he interests of the school board and those of the teacher will both be fully protected by a procedure which advises the nontenured teacher of a proposed purpose not to renew his contract and affords him a hearing at which the legitimacy of the reasons compelling such action is determined."

In *Orr*, the court had noted that the plaintiff had been requested to resign prior to his being informed of the nonrenewal of his contract. From this fact, the court reasoned (*id.* at 1045):

> "The clear inference is that plaintiff would have benefitted by resigning, rather than having board action shown on his record. The only conceivable benefits are plaintiff's professional standing and the effect of a public discussion on his professional reputation."

Although the decision in *Orr* was reversed on appeal, the appellate court did not disturb this finding. The district court's observations in *Orr* are borne out by a recent survey of procedures utilized in the nonrenewal of teachers' contracts conducted by NEA's Research Division. The survey was of a stratified sample of 11,717 public school systems throughout the United States.[36] The school systems were asked to indicate their usual procedures on resignations before and after formal notice to teachers that their contracts would not be renewed on expiration. The data showed that in 9 out of 10 school systems "teachers are given a chance to resign in advance of formal notice of contract nonrenewal, whether the opportunity to resign is self-initiated or on recommendation of the school authorities" (App. 4a-5a). In almost half of these systems (47 percent) resignation is affirmatively recommended to the teacher by the school officials. Obviously, school systems would not follow such a policy unless they believed that teachers would consider re-

---

[36] Relevant portions of the NEA Research Memo, *School-Board Procedures Upon Nonrenewal of Teachers' Contracts* (Sept. 1971) are set forth in the Appendix to this brief.

signation as a valuable option in protecting their professional reputation and standing.

C. Empirical Evidence Shows That Due Process Procedures Would Impose No Significant Burden on School Administrators and Boards.

Any notion that the provision of *hearings* would impose overly burdensome administrative inconvenience has no empirical support, the suggestion to the contrary in the *Drown* case notwithstanding. *Drown v. Portsmouth School Dist.*, 435 F.2d 1182 (1970), *cert. denied*, 402 U.S. 972 (1971).

With respect to the teacher's interest in having a *statement of reasons* for the contract nonrenewal, the court in *Drown* observed that "[f]rom the viewpoint of the school board, a requirement that it state its reasons for not rehiring a non-tenured teacher would impose no significant administrative burden. Nor would it significantly inhibit the board in ridding itself of incompetent teachers" (435 F.2d at 1185). Citing Section 14.20.180(a) of the Alaska Statutes and Section 28.67.070 of the Washington Revised Code Annotated, the court noted that "several states presently require their school boards" to provide a written statement of reasons for nonretention, and that therefore this was evidence of "the workability of such a requirement" (*id.* at 1185 & n. 6).

The First Circuit took the opposite approach to the need for an adjudicatory *hearing*. The teacher had argued that "the right to a statement of the reasons for not being rehired is meaningless unless the school board can be forced to prove those reasons at a hearing" (*id.* at 1185). The court noted that the hearing called for by the teacher "would involve the full trappings of counsel, cross-examination, rules of evidence [and] a verbatim record." Rejecting such a requirement, the court maintained, *inter alia*, that "the invoking of such adjudicative apparatus

[would] be an added, expensive and unfamiliar obligation of the school district" (*id.* at 1185-86).

The First Circuit's characterization of the requirement of a trial-type hearing as an unmanageable administrative burden "is clearly refuted by actual practices in this country" (Resp. Br. 43). Aside from statutes in 45 states and the District of Columbia which require a statement of reasons and a hearing before the employment of *tenured* teachers can be terminated (*see* Resp. Br. 43 n.29), statutes of 18 states[37] require some form of procedural due process prior to the nonrenewal of a *nontenured* teacher's contract.[38]

---

[37]The 18 states and their statutory provisions are as follows:

Alaska: Alaska Stats., tit. 14, §§ 14.20.140-45, 14.20.175-80 (1971)

Arkansas: Ark. Stat. Ann., ch. 74, § 80-1304 (1970)

California: Calif. Educ. Code §§ 13404-40, 13442-43 (Deering 1969)

Connecticut: Conn. Gen. Stat., tit. 10, § 10-151 (Supp. 1969)

Delaware: Del. Code Ann., tit. 14, §§ 1401-14, 1420 (Supp. 1970)

Indiana: Ind. Stats. Ann. §§ 28–4307-08, 28–4312 (Burns 1948)

Iowa: Iowa Code Ann., tit. 12, §§ 279.13, 279.24 (1949, Supp. 1971)

Kentucky: Ky. Rev. Stats. §§ 161.750, 161.790 (Baldwin 1969)

Minnesota: Minn. Stats. § 125.12 (1965)

Missouri: Mo. Rev. Stats. § 168.111 (Supp. 1967)

Nebraska: Neb. Rev. Stats. § 79-1254 (1966)

Nevada: Nev. Rev. Stats. §§ 391.312–.3197 (1967)

North Dakota: N. Dak. Cent. Code §§ 15-47-27, 15-47-38 (Supp. 1969)

Oregon: Ore. Rev. Stats. §§ 342.508-13, 342.530 (1969)

Rhode Island: R. I. Gen. Laws §§ 6-13-2, 6-13-4 (1969, Supp. 1970)

Texas: Tex. Code Ann. § 21.201-16 (1969)

Washington: Wash. Rev. Code §§ 28A.67.070, 28A.58.450-.515 (Supp. 1970)

Wisconsin: Wisc. Stats. § 118.22 (1969) (as modified by the *Roth* decision)

[38]For a complete summary of all the state statutory provisions, *see* NEA Research Div., *Teacher Tenure and Contracts* (1971) (Research

Four of these states—Arkansas, Iowa, North Dakota and Washington—make no distinction between tenured or nontenured teachers and require the same type of procedures for all teachers. Four others—Oregon, Minnesota, Nebraska and Wisconsin—require such procedures only for certain school systems within the state.

In 12 of the 18 states—Alaska, Arkansas, California, Connecticut, Iowa, Nebraska, Nevada, North Dakota, Rhode Island, Texas, Washington and Wisconsin—a nontenured teacher has a right to both a statement of reasons *and* a hearing with respect to the nonrenewal of his contract. In the other six states, the teacher has a right only to a statement of reasons for the nonrenewal.[39]

Rep. 1971-R3). For an analysis of these provisions, *see* NEA Research Div., *Statutory Hearing Rights of Nontenured Teachers*, 49 NEA Research Bull. 17, 18-20 (1971).

[39] All of the 18 states require procedural due process for mid-term dismissal of nontenured teachers as well. Eight other states also accord nontenured teachers a right to a statement of reasons and a hearing prior to mid-term dismissal. These states and the statutory provisions are as follows:

Colorado: Colo. Rev. Stats. §§ 123–18–10-17 (Supp. 1967)
Massachusetts: Mass. Ann. Laws, ch. 71, §§ 42-43 (1971)
Mississippi: Miss. Code Ann. § 6282-26 (Supp. 1971)
Montana: Mont. Rev. Code §§ 75-2401, 75-2411 (1962, Supp. 1969)
North Carolina: N. Car. Gen. Stats. §§ 115-67, 115-145 (1966)
Oklahoma: Okla. Stats. tit. 70, §§ 6-1, 6-2, 6-24 (1961, Supp. 1970)
Vermont: Vt. Stats. Ann., tit. 16, § 1752 (1968)
Wyoming: Wyo. Stats. §§ 21.1–155-58, 21-1–160 (Supp. 1969)

Three other states require only a statement of reasons before dismissal of the nontenured teacher, but no hearing:

Illinois: Ill. Rev. Stats., ch. 122, § 24-12 (1965)
Kansas: Kan. Stats. Ann., ch. 72, §§ 5403-07 (1964, Supp. 1969)
Louisiana: La. Stats. Ann., tit. 17, §§ 443, 461-62 (West 1963)

The hearings provided by the state statutes generally are trial-type in character. The most detailed safeguards are required in Alaska, California and Washington. Alaska, for example, requires that the hearing be under oath or affirmation, that the teacher have the rights to cross-examination, to be represented by counsel and to subpoena any adverse witnesses, as well as that a record of the hearing be made, that a copy of the record be furnished at cost upon the teacher's request, and that findings of fact and conclusions of law be made. California additionally requires that the hearing be conducted by a third party—a hearing officer who shall prepare a proposed decision containing findings of facts and a determination as to the sufficiency of the cause or a recommendation as to the disposition of the case, which is then submitted for decision to the governing board. Washington permits the hearing to be held either before a state superior court as an original matter or before the board of education with the rights of appeal for a *de novo* hearing before the superior court.

Other states, such as Arkansas and North Dakota, while providing similar safeguards, usually hold the hearings in private unless otherwise agreed upon by the parties. Alaska and Washington also permit the hearings to be private at the option of the teacher.

In addition to the statutory requirements for hearings, NEA's Research Memo reprinted in the Appendix to this brief shows that many school systems hold hearings as a consequence of school board policy or negotiated agreement (App. 2a-3a).[40]

[40] Just as respondent, NEA does not attempt here "to delineate the precise attributes which a due process hearing should possess" Resp. Br. 29 n.17), but endorses "the general conclusions of court below" with respect to those various attributes (*id.*). With respect to the question of the need for an "impartial tribunal," NEA believes that the Board of Regents, having already made a formal determination not to renew Sindermann's contract, could not impartially sit to review its own determination. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Cultross v. Weaver, C.A. No. 71-C-75; W.D.

Thus, a requirement of a statement of reasons and a hearing is not an "unfamiliar obligation" in many school districts and has clearly not proved to be an unmanageable administrative burden. Rather, to paraphrase the First Circuit in *Drown* (435 F.2d at 1185), the fact that a considerable number of states and local school districts presently require their school boards to provide a hearing, as well as a statement of reasons, in cases of contract nonrenewal is evidence of the workability of such a requirement. If such procedural requirements are feasible at the elementary and secondary school levels, surely they are workable at higher educational levels where the number of teachers is perceptibly smaller.

Wisc., July 23, 1971: "I think it is a very serious question whether the reviewing tribunal may be identical to the tribunal which has previously arrived at a formal operative decision on the merits." (Slip. Op. 7). This is especially so since Sindermann opposed the Board's stated positions. *Cf.* Pickering v. Board of Educ., 391 U.S. 563, 578 n.2 (1968). NEA further agrees that a school board, as an employer, "can never act as an impartial tribunal when called upon to resolve employer-employee conflicts" (Resp. Br. 46 n.32). In this regard, it is significant to note that appropriate alternatives are available and are being utilized. As found by NEA's Research Division in its Research Memo on *School-Board Procedures* (App. 4a):

> "[O]f interest is the sizeable number of school systems utilizing third parties to hear and determine contract nonrenewal cases. . . . [I]n one-fourth of the reporting school systems, the hearings are or can be held before a third party and in 15.6 percent of the systems, the third party determines or can determine the nonrenewal issue."

For a survey of the use of third parties for adjudicating the rights of of tenured teachers in eight states—California, Colorado, Nevada, New Jersey, New York, Oregon, Texas and Washington—*see* NEA Research Div., *Provisions in Tenure Laws for Impartial Hearing Tribunals*, 49 NEA Research Bull. 20 (1971).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the respondent's brief, the Fifth Circuit's judgment on the substantive issue should be affirmed. With respect to the procedural due process issue, NEA agrees with respondent (Resp. Br. 52-53) that "this Court should hold that Sindermann was unconstitutionally denied a hearing prior to non-renewal, and that the remedy therefor should be reinstatement and back pay without consideration of whether the non-renewal was substantively justified" (*see* Resp. Br. 46-50).

Respectfully submitted,

DAVID RUBIN
Deputy General Counsel
National Education Association
1201 - 16th Street, N.W.
Washington, D.C. 20036
202/833-4451

RICHARD J. MEDALIE
Epstein, Friedman and Duncan
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/628-7234

Attorneys for the
National Education Association

October 7, 1971.

APPENDIX

NEA RESEARCH MEMO
Research Division
National Education Association
1201 Sixteenth Street, N.W. • Washington, D.C. 20036

RESEARCH MEMO 1971-27 September 1971

SCHOOL-BOARD PROCEDURES UPON NON-RENEWAL OF TEACHERS' CONTRACTS

DO SCHOOL BOARDS provide hearings for teachers, including nontenure teachers, when employment contracts are not renewed? Do the school-board procedures provide for a statement of reasons for nonrenewal of contracts? Are teachers given an opportunity to resign before and/or after formal notice of nonrenewal? These questions are among the many and varied items related to programs and administrative practices of public school systems in the United States contained in the quinquennial survey conducted in May 1971 by the NEA Research Division.

The 1971 survey covers the estimated 11,717 public school systems in the country with an enrollment of 300 or more pupils. Questionnaires were mailed to a stratified sample of public school systems of this size. In view of the omnibus nature of the survey, the replies to the many and varied questions are being tabulated gradually and the results are being released in segments. Highlighted here are the survey findings on school-board procedures associated with the nonrenewal of teaching contracts. This report includes responses from just over 70 percent of the queried systems.

Copyright 1971 by the
National Education Association
All Rights Reserved

The responses were proportionally weighted to give an approximation for the estimated 11,717 school systems in the United States enrolling 300 or more pupils.

* * * * *

Authority for Hearings

The responding systems which affirmatively reported that hearings are provided for all or some of their teachers were asked to indicate by what authority the hearings are made available. The answers to this question are summarized in Table 1. As may be seen, statutory mandate is identified by 86 percent of the reporting systems as the mainspring of authority for the hearing to tenure teachers. This statutory source is reflected as well in those systems which, for tenure teachers, reported that the authority stems from negotiated agreements between school employers and teachers associations or school-board policy.

On the other hand, school-board policy is overwhelmingly the source of authority by which hearings are provided to nontenure teachers in systems reporting separate authority for hearings for tenure teachers and nontenure teachers. In this group of school systems, 4 in 5 (78 percent) indicated that hearings are provided as a matter of board policy, while 15.8 percent indicated that hearings are provided by negotiated agreement.

In systems where hearings are available to all teachers, the authority stems from statute in almost half (47.4 percent) of the systems in this group while school-board policy accounts for 40.7 percent.

Statement of Reasons for Nonrenewal of Contracts

The survey sought to learn whether a statement of reasons is furnished to teachers whose contracts will not be renewed. The findings appear in Table 2. Two-thirds of the systems in Group 1 (those reporting identical hearing procedures for all teachers) said they always give the teacher a statement of reasons for not renewing the contract; slightly less than 30 percent said a statement is given if

requested by the teacher. In Group 2 (those having procedures for tenure teachers only or having separate procedures for tenure teachers and nontenure teachers) 84 percent indicated that tenure teachers are always told why their contracts are not being renewed while 13 percent reported that tenure teachers receive a statement on request. In Group 3 (those with separate policies for nontenure teachers) almost three-fifths of the systems reported that they give a statement of reasons for nonrenewal of contract to the nontenure teacher upon request.

Availability of Hearings

To discover whether hearings are automatic or are available only upon request of the teacher, the school systems were asked to identify what procedure they followed. Table 3 depicts the results. This table shows that in 4 in 5 systems (79.1 percent) in Group 1 a hearing is held only if requested by the teacher, while almost 20 percent always hold hearings for teachers whose contracts are not being renewed. In Group 2 just over half of the systems provide a hearing upon request of the teacher and a slightly smaller number (46.7 percent) always provide a hearing. In Group 3, 4 in 5 systems provide a hearing if the nontenure teacher asks for one; the remaining systems in this group (19.5 percent) do not accord hearings to nontenure teachers.

Hearing Unit and Decision Maker

Two other facets of the hearing procedure were queried. First, if a hearing is provided in contract nonrenewal situations, before whom is the hearing held? The survey produced these findings:

Hearing unit	Percent of reporting systems
School board only	68.6%
Third party only	18.6
School board or third party (both procedures may apply)	6.1
Not reported	6.7
Total	100.0%

Second, who makes the determination in the case? The responses to this question were as follows:

Determination unit	Percent of reporting systems
School board only	76.9%
Third party only	5.2
School board or third party (both procedures may apply)	10.4
Not reported	7.5
Total	100.0%

While only the school board is the hearing tribunal and the decision maker in a great majority of the school systems, of interest is the sizeable number of school systems utilizing third parties to hear and determine contract nonrenewal cases. As the figures above show, in one-fourth of the reporting school systems, the hearings are or can be held before a third party and in 15.6 percent of the systems, the third party determines or can determine the nonrenewal issue.

Resignation Procedures

School systems were also asked to indicate what is the usual procedure on resignations before and after formal notice to teachers that their contracts will not be renewed on expiration. The survey results lined up this way:

Usual resignation procedure	Before formal notice to teacher	After formal notice to teacher
Allow teacher to resign at his request	42.8%	21.9%
Recommend to teacher that he resign	47.0	18.3
Resignation not permitted	0.8	6.8
Not reported or not applicable	9.4	53.0
Total	100.0%	100.0%

These data show that in 9 in 10 school systems teachers are given a chance to resign in advance of formal notice of

contract nonrenewal, whether the opportunity to resign is self-initiated or on recommendation of the school authorities. Although there is less opportunity to resign after formal notice is given to the teacher, 4 in 10 school systems still permit resignations at this stage.

* * * * *

TABLE 1.—AUTHORITY FOR PROVIDING HEARINGS TO TEACHERS WHOSE CONTRACTS WILL NOT BE RENEWED

Authority	Percents of school systems reporting		
	Group 1. Systems having identical procedures for *all teachers*	Group 2. Systems having procedures for *tenure teachers only* or separate procedures for *tenure teachers*	Group 3. Systems having separate procedures for *nontenure teachers*
1	2	3	4
Statute	47.4%	85.9%	6.2%
Negotiated agreement	11.9	7.5	15.8
Board policy	40.7	6.6	78.0
	100.0%	100.0%	100.0%

TABLE 2.—STATEMENT OF REASONS GIVEN TO TEACHERS WHOSE CONTRACTS WILL NOT BE RENEWED

Statement given?	Percents of school systems reporting		
	Group 1. Systems having identical procedures for *all teachers*	Group 2. Systems having procedures for *tenure teachers only* or separate procedures for *tenure teachers*	Group 3. Systems having separate procedures for *nontenure teachers*
1	2	3	4
No	5.3%[a]	3.0%[a]	37.9%
Yes, always	66.2	84.0	3.8
Yes, if requested	28.5	13.0	58.3
	100.0%	100.0%	100.0%

[a] These negative responses appear to be inconsistent with statutory rights of tenure teachers to a statement of reasons and a hearing when dismissal is being considered during or at the end of the school year. A possible explanation is that the process of annual renewal of contract does not apply to tenure teachers; hence, a negative response was given.

TABLE 3.—HEARINGS HELD FOR TEACHERS WHOSE CONTRACTS WILL NOT BE RENEWED

Is hearing held?	Percents of school systems reporting		
	Group 1. Systems having identical procedures for *all teachers*	Group 2. Systems having procedures for *tenure teachers only* or separate procedures for *tenure teachers*	Group 3. Systems having separate procedures for *nontenure teachers*
1	2	3	4
No	2.0%[a]	2.4%[a]	19.5%
Yes, always	18.9	46.7	0.0
Yes, if requested	79.1	50.9	80.5
	100.0%	100.0%	100.0%

[a] These negative responses appear to be inconsistent with statutory rights of tenure teachers to a statement of reasons and a hearing when dismissal is being considered during or at the end of the school year. A possible explanation is that the process of annual renewal of contract does not apply to tenure teachers; hence, a negative response was given.

OCT 7 1971

Supreme Court, U.S.
FILED
NOV 9 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

~~No. 952~~ 70-36

CHARLES R. PERRY, ET AL.,

Petitioners,

vs.

ROBERT P. SINDERMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE.

JOHN LIGTENBERG,
134 North LaSalle Street,
Chicago, Illinois 60602,
(312) 236-0606,
General Counsel, American Federation of Teachers.

Of Counsel:
ANDREW J. LEAHY.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

TABLE OF CONTENTS.

Argument:	PAGE
I. "Expectancy of Employment" Is Irrelevant in Cases Charging Dismissal for the Exercise of First Amendment Rights	4
II. Resolution of Disputes Concerning Termination Requires a Hearing	6
III. All Cases of Non-Retention Require a Hearing	7
IV. Procedural Due Process Under 1983 Should Include Reasonable Notice and a Hearing Before an Independent Tribunal	8
Conclusion	11
Petition for Leave to File Brief as Amicus Curiae	1

TABLE OF CITATIONS.

Cases.

Arkansas Valley etc. v. Atchison, Topeka & Santa Fe RR., 49 Okla. 282	8
Commonwealth Coatings Corporation v. Continental Casualty Co., 393 U. S. 145, 89 S. Ct. 337	10
Drown v. Portsmouth School District, 435 F. 2d 1182 1st Cir. 1970) cert. denied 39 L. W. 3511 (May 18, 1971)	5
Johnson v. Branch, 364 F. 2d 177 (4th Cir. 1966) cert. denied 385 U. S. 1003 (1967)	5
Jones v. Hopper, 410 F. 2d 1323 (1969), cert. denied 397 U. S. 991	5

Keyishian v. Board of Regents, 385 U. S. 589 (1967) 5
McLaughlin v. Tilendis, 398 F. 2d 287 (7th Cir. 1968) 5
Morgan v. United States, 304 U. S. 1 (1938) 10
Murchison, In Re, 349 U. S. 133 (1959) 75 S. Ct. 623.. 10
Parker v. Board of Education, 348 F. 2d 464 5
Pickering v. Board of Education, 391 U. S. 563 (1968) 3, 8
Pickering v. Board of Education, 36 Ill. 2d 568, 578-585 . 8
Pred v. Board of Public Instruction, 415 F. 2d 851 (5th Cir. 1969) 5
Rolfe v. County Board of Education, 391 F. 2d 77 (6th Cir. 1968) 5
Shelley, In Re, 332 Pa. 358 8
Smith v. Board of Education (8th Cir. 1966)..... 5
Tumey v. Ohio, 273 U. S. 510 (1927) 47 S. Ct. 437.... 11
Wilson v. Michigan State, etc., 228 Mich. 25 8

Statute.

42 U. S. C. § 1983 ..... 11, 6, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 952.

CHARLES R. PERRY, ET AL.,

Petitioners,

vs.

ROBERT P. SINDERMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF.

Now comes the American Federation of Teachers by its General Counsel, John Ligtenberg, and petitions the Court for leave to file a brief as *amicus curiae* in the above captioned cause and in support thereof states as follows:

1. The American Federation of Teachers is a union of teachers affiliated with the AFL-CIO. The overwhelming majority of its members teach in the public schools. The American Federation of Teachers is composed of approximately 1,000 locals located throughout the United States with more than 250,000 members. Of the 1,000 locals ap-

proximately 200 are local unions at the college and university level.

2. The American Federation of Teachers and its local unions and many of its members have been involved in much litigation throughout the United States concerning dismissals of teachers. Many of these cases have been filed in United States District Courts under Section 1983 of the Civil Rights Act, and others are being considered. The American Federation of Teachers has traditionally provided financial assistance for the defense of members whose employment is terminated.

3. The American Federation of Teachers is deeply interested in the case at bar, as the decision of this Court in the case at bar will have a substantial effect upon the rights of its members, and may well have decisive effect upon many of these cases.

4. A request has been made of the attorneys representing the appellant and appellee seeking their consent to the filing of a brief *amicus curiae* by the American Federation of Teachers. Both have indicated their consent and have filed copies of their consent with the Clerk of this Court.

WHEREFORE, petitioner asks leave that its brief *amicus curiae* may be filed with this Court.

JOHN LIGTENBERG,
134 North LaSalle Street,
Chicago, Illinois 60602,
(312) 236-0606,
General Counsel, American Federation of Teachers.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 952.

CHARLES R. PERRY, ET AL.,

Petitioners,

vs.

ROBERT P. SINDERMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE.

INTRODUCTION.

This case is a sequel to *Pickering* v. *Board of Education,* 391 U. S. 563 (1968). The rights asserted by the plaintiff include not just free speech but the right of association. The chief distinctions are that defendants appear to deny they interfered with plaintiff's rights and the case comes to this court via 42 USC 1983 rather than by way of a review of a hearing by a school board.

The brief in behalf of the teacher is quite thorough and

requires little amplification. The American Federation of Teachers will limit its remarks to those matters which its experience has taught require special emphasis.

ARGUMENT.

I.

"EXPECTANCY OF EMPLOYMENT" IS IRRELEVANT IN CASES CHARGING DISMISSAL FOR THE EXERCISE OF FIRST AMENDMENT RIGHTS.

Plaintiff Sindermann like most of the two million public school teachers in the United States signed a one-year contract, taught a year, signed another contract and repeated the process until he was advised in the spring of 1969 that there would be no more contracts. Traditionally, teachers who found themselves in this situation were advised by school administrators, fellow teachers and lawyers that if they had not achieved "tenure" and if the notice was timely there was no recourse to any court to determine whether the termination was justified or not. This was generally considered to be the case even if the teacher believed he was not retained because of exercising freedom of speech or asserting other constitutional rights.

Thus there has been, and still is, an absence of state remedies available to non-tenured public school teachers who wish to challenge their non-retention by school officials.

This case thus presents two matters for consideration (1) the substantive constitutional rights of teachers who are not protected by tenure laws; (2) the procedural rights of teachers who are not protected by tenure laws.

The Court of Appeals in this case as well as in other cases held that the tenure status of plaintiff is irrelevant for purposes of defining a cause of action under 1983 for violation of substantive constitutional rights. Citing its

own decision in *Pred* v. *Board of Education*, 415 F. 2d 851 the Court stated:

> "Equally unpersuasive is the related argument that since there is no constitutional right to public employment school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any rights protected by § 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractual one, nor could it be since no right to reemployment existed. What is at stake is the vindication of constitutional rights—the right not to be punished by the State or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendment rights." 415 F. 2d at 856.

This statement of the law is consistent with *Keyishian* v. *Board of Regents*, 385 U. S. 589, 87 S. Ct. 675 (1967) wherein this Court held that a non-tenured teacher cannot be denied employment because of the exercise of First Amendment rights.

The same position has been taken in several circuits. The First Circuit in *Drown* v. *Portsmouth School District*, 435 F. 2d 1182 (1970) held in regard to a non-tenured teacher:

> "Nevertheless, there is no doubt that appellant has an interest in being rehired sufficient to prevent the school district from not doing so for constitutionally impermissible reasons."

Likewise *Johnson* v. *Branch*, 364 F. 2d 177 (4th Cir. 1966); *Rolfe* v. *County Board of Education*, 391 F. 2d 77 (6th Cir. 1968); *McLaughlin* v. *Tilendis*, 398 F. 2d 287 (7th Cir. 1968); and *Smith* v. *Board of Education* (8th Cir. 1966), support this analysis.

The appellants in this case indicate strong reliance upon one case which appears to depart from this analysis, *Jones* v. *Hopper*, 410 F. 2d 1323 (10th Cir. 1969). See also *Parker* v. *Board of Education*, 348 F. 2d 464.

These courts speak in terms of "expectancy" of continued employment. They appear to require that the teacher shall, as a condition precedent to a cause of action, prove that he had an expectancy of continued employment.

That expectancy of employment has some relevance cannot be disputed. However, it is but one aspect of a § 1983 case. By way of example, if 30 teachers of approximately the same competence apply for 10 positions it is apparent that 20 will be denied employment and that none of the thirty can prove an expectancy of employment as to himself. If the employer tells one of them that he will not even be considered because of the teacher's political views or associations, it is apparent that there has been an infringement of basic rights. However, the teacher could not prove that he would have obtained the job. The school officials in this case suggest that such a teacher could not prevail in a claim under § 1983 although there had been a clear infringement of constitutional rights. This proposition is contradicted by a clear majority of the circuits and by previous decisions of this Court noted above.

The mis-analysis of *Jones* v. *Hopper* seems to be traceable to that court's treating "expectancy of continued employment" as the interest which Professor Jones asserted. Whether "expectancy of continued employment" is constitutionally protected is not essential to a cause of action charging interference with the rights of free speech and association.

II.

RESOLUTION OF DISPUTES CONCERNING TERMINATION REQUIRES A HEARING.

The rule which appears to apply in cases of possible infringement of a teacher's constitutional rights is that such may not be a factor used by school officials in deciding to deny further employment.

This rule is, of course, consistent with the decisions of this Court which hold that restrictions on basic constitutional rights must be narrowly drawn and construed. If it were otherwise the teacher could insure that his political views and associations would not become a factor only by remaining silent.

This, of course, is essentially how cases under the N. L. R. A. are handled. If a person's union activity is a factor in his discharge, the discharge is deemed improper. N. L. R. A. Sec. 8(a)(3). 29 USC § 158(a)(3). See note page 22, Respondent's Brief.

Whether or not there was retaliation by school officials for the exercise of constitutional rights and what form the retaliation took are fact questions which normally cannot be decided without a hearing involving the taking of evidence.

If litigants in § 1983 cases had to depend on clear and direct proof of interference by officials with constitutional rights there would be no causes of action under § 1983. Likewise, the long experience of the N. L. R. B. demonstrates that such disputes can generally be resolved only by the use of circumstantial evidence and the drawing of inferences. Credibility is obviously a crucial factor. Summary procedures thus are not well adopted to resolving disputes as to the reasons for termination of employment.

III.

ALL CASES OF NON-RETENTION REQUIRE A HEARING.

Respondents ably point out the effects of non-retention upon a teacher. We wish only to raise one additional aspect of such decisions. It has long been asserted that an employer can fire a person for a good reason or for no reason. We question the propriety of this proposition when applied to government.

It is untenable for government to act for "no reason." The private owner of property can afford to be arbitrary. Government cannot. Discretion is not caprice. It is supposed to be reasoned judgment based upon facts. See *Wilson* v. *Michigan State Board of Registration*, 228 Mich. 25; *In re Shelley*, 332 Pa. 358; *Arkansas Valley Town Etc.* v. *Atchison, Topeka & Santa Fe RR.*, 49 Okl. 382.

We suggest that it is no infringement upon government to require it to have reasons for decisions. It is certainly no imposition on a school administrator to expect him to be able to say why he is terminating someone's employment. Whether a matter of constitutional law or common sense it is apparent that the minimal right of a government employee is to know why he is not retained and to be given a reasonable chance to correct false assumptions.

IV.

PROCEDURAL DUE PROCESS UNDER § 1983 SHOULD INCLUDE REASONABLE NOTICE AND A HEARING BEFORE AN INDEPENDENT TRIBUNAL.

The Court of Appeals has established a set of guidelines by which institutions should handle termination of teacher employment in order to afford minimal constitution protection.

The procedures appear to be reasonable and fair. However, one important aspect of those procedures deserves serious consideration by this court, namely the tribunal which will resolve disputes. Although the Court of Appeals has directed that such tribunals be impartial, if the institution controls the establishment of the tribunal, there is serious doubt that such tribunals can be impartial. The dissent in *Pickering* at the state level amply points this out. See 36 Ill. 2d 568, 578-585.

For an understanding of the problem, it is necessary to

review how educational institutions decide not to renew a contract. In the typical college there are generally four or more levels of influence. The Department Chairman makes a recommendation to the Dean of a School, the Dean makes a recommendation to the President and the President makes a recommendation to the Board. Special committees at each of these levels may also be involved in the process.

When efforts are made to find out why employment is terminated, lower ranking administrators regularly assert that their power is limited to making recommendations. Those at the highest levels often disclaim responsibility asserting that they merely rely on recommendations of those at the lower levels.

The reasons for termination, if revealed, are couched in language calculated to disguise rather than to communicate the basis for the decision. Hence such slogans as "lack of compatibility with the goals of the university" have a good sound but convey nothing.

The procedures outlined by the 5th Circuit should have the beneficial effect of forcing those who actually make decisions to accept the responsibility for making them. It should likewise have the beneficial effect of requiring the decision makers to articulate reasons in straight forward language and to base those reasons on facts, not speculation or feelings.

As things now stand a set of formal reports from several levels of school administration gives the appearance of substance where there is in fact little or nothing of substance to support a decision.

Allowing school officials to have substantial control over the selection of tribunal members may have the net result of providing judicial approval of this administrative paper shuffling. The institution is likely to appoint panels, the members of which are the products of a system which often substitutes form for substance.

The power to decide a controversy, even though subject to judicial review, is far too important to entrust to one of the participants to a dispute. One of the functions of 42 U. S. C. 1983 is to provide a forum which is insulated from partisan or parochial influences. Unless additional safeguards are imposed by this Court, both the aims of 42 U. S. C. 1983 and the Constitution requirements of due process are in jeopardy.

Whether proceedings are before an administrative agency or a court, a litigant is entitled to a hearing before a fair and impartial tryer of the facts. This Court has so held on numerous occasions: *Tumey* v. *Ohio,* 273 U. S. 510 (1927) 47 S. Ct. 437; *In re Murchison,* 349 U. S. 133 (1959) 75 S. Ct. 623; *Morgan* v. *United States,* 304 U. S. 1 (1938); and *Commonwealth Coatings Corporation* v. *Continental Casualty Co.,* 393 U. S. 145, 89 S. Ct. 337.

The last cited case stated the rule rather simply

> ". . . any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Nor would such a safeguard impinge on the prerogatives of school authorities. The long experience under the N. L. R. A. adequately demonstrates that management discretion can be and is protected. If school administrators, who by their status, possess obvious advantages over teachers when testifying, are fearful of submitting the justification for termination of employment to a truly impartial tribunal then such decisions are suspect.

Probably the greatest single source of difficulty in present day tenure dismissal cases (aside from the cost) is that boards of education sit as tribunals to decide whether to dismiss a teacher that they have already decided to dismiss. The outcome is predictable with 99% accuracy. The net effect is that each side merely attempts to make a

record. In fact, success can be better obtained on review by the teacher if the board was patently unfair.

The impact of termination of employment on a teacher often is overwhelming. He is simply not able to start anew at another institution because its doors are closed to him. If indeed, he is forced out of teaching because of a termination of services then it is in the public interest that the matter be handled in a forthright manner. This can in large part be accomplished by insuring that the panel is actually impartial and not controlled in any way by the participants to the dispute.

CONCLUSION.

The American Federation of Teachers has had long experience with cases involving the termination of the employment of teachers. There can be little doubt that it is in the interest of both educational institutions and teachers for each side to submit its case to a genuinely impartial panel. In such instances the educational institution is more likely to put forward its best case and to avoid reference to petty incidents. On the teachers side, he will be effectively compelled to present his case with minimal resort to challenging the procedures under which the case is tried. The likely result is that disputes can be quickly resolved and matters laid to rest.

Respectfully submitted,

JOHN LIGTENBERG,
134 North LaSalle Street,
Chicago, Illinois 60602,
(312) 236-0606,
General Counsel, American Federation of Teachers.

Of Counsel:
ANDREW J. LEAHY.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PERRY ET AL. *v.* SINDERMANN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70–36. Argued January 18, 1972—Decided June 29, 1972

Respondent was employed in a state college system for 10 years, the last four as a junior college professor under a series of one-year written contracts. The Regents then declined to renew his employment for the next year, without giving him an explanation or prior hearing. Respondent then brought this action in the District Court, alleging that the decision not to rehire him was based on respondent's public criticism of the college administration and thus infringed his free speech right, and that the Regents' failure to afford him a hearing violated his procedural due process right. The District Court granted summary judgment for petitioners, concluding that respondent's contract had terminated and the junior college had not adopted the tenure system. The Court of Appeals reversed on the grounds that, despite lack of tenure, nonrenewal of respondent's contract would violate the Fourteenth Amendment if it was in fact based on his protected free speech, and that if respondent could show that he had an "expectancy" of re-employment, the failure to allow him an opportunity for a hearing would violate the procedural due process guarantee. *Held:*

1. Lack of a contractual or tenure right to re-employment, taken alone, did not defeat respondent's claim that the nonrenewal of his contract violated his free speech right under the First and Fourteenth Amendments. The District Court therefore erred in foreclosing determination of the contested issue whether the decision not to renew was based on respondent's exercise of his right of free speech. Pp. 3–5.

2. Though a subjective "expectancy" of tenure is not protected by procedural due process, respondent's allegation that the college had a *de facto* tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an oppor-

tunity of proving the legitimacy of his claim to job tenure. Such proof would obligate the college to afford him a requested hearing where he could be informed of the grounds for his nonretention and challenge their sufficiency. Pp. 6–10.

430 F. 2d 939, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion. BRENNAN, J., filed an opinion dissenting in part, in which DOUGLAS, J., joined. MARSHALL, J., filed an opinion dissenting in part. POWELL, J., took no part in the decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70-36

Charles R. Perry et al., Petitioners, *v.* Robert P. Sindermann, etc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 29, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the cochairman of his department.

During the 1968–1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status—a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Finally, in May 1969, the respondent's one-year employment contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year. The Regents issued a press release setting forth allegations of the respondent's insubordination.[1] But they provided him no official statement of the reasons for the nonrenewal of his contract. And they allowed him no opportunity for a hearing to challenge the basis of the nonrenewal.

The respondent then brought this action in a federal district court. He alleged primarily that the Regents' decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech. He also alleged that their failure to provide him an opportunity for a hearing violated the Fourteenth Amendment's guarantee of procedural due process. The petitioners—members of the Board of Regents and the president of the college—denied that their decision was made in retaliation for the respondent's public criticism and argued that they had no obligation to provide a hearing.[2] On the basis of these bare pleadings and three brief affidavits filed by the respondent,[3] the District Court granted summary judgment for the petitioners. It concluded that the respondent had "no cause of action against the [petitioners] since his contract of em-

---

[1] The press release stated, for example, that the respondent had defied his superiors by attending legislative committee meetings when college officials had specifically refused to permit him to leave his classes for that purpose.

[2] The petitioners claimed, in their motion for summary judgment, that the decision not to retain the respondent was really based on his insubordinate conduct. See n. 1, *supra*.

[3] The petitioners, for whom summary judgment was granted, submitted no affadavits whatever. The respondent's affadavits were very short and essentially repeated the general allegations of his complaint.

ployment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system." [4]

The Court of Appeals reversed the judgment of the District Court. *Sindermann* v. *Perry*, 430 F. 2d 939. First, it held that, despite the respondent's lack of tenure, the nonrenewal of his contract would violate the Fourteenth Amendment if it in fact was based on his protected free speech. Since the actual reason for the Regents' decision was "in total dispute" in the pleadings, the court remanded the case for a full hearing on this contested issue of fact. *Id.*, at 942–943. Second, the Court of Appeals held that, despite the respondent's lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent could show that he had an "expectancy" of re-employment. It, therefore, ordered that this issue of fact also be aired upon remand. *Id.*, at 943–944. We granted a writ of certiorari, 403 U. S. 917, and we have considered this case along with *Board of Regents* v. *Roth*, *ante*.

I

The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.

For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—

[4] The findings and conclusions of the District Court—only several lines long—are not officially reported.

especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall*, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.

We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall*, *supra*, unemployment benefits, *Sherbert* v. *Verner*, 374 U. S. 398, 404–405, and welfare payments, *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6; *Graham* v. *Richardson*, 403 U. S. 365, 374. But, most often, we have applied the principle to denials of public employment. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100; *Wieman* v. *Updegraff*, 344 U. S. 183, 192; *Shelton* v. *Tucker*, 364 U. S. 479, 485–486; *Torasco* v. *Watkins*, 367 U. S. 488, 495–496; *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 288; *Baggett* v. *Bullitt*, 377 U. S. 360; *Elfbrandt* v. *Russell*, 384 U. S. 17; *Keyshian* v. *Board of Regents*, 385 U. S. 589, 605–606; *Whitehill* v. *Elkins*, 389 U. S. 54; *United States* v. *Robel*, 389 U. S. 258; *Pickering* v. *Board of Education*, 391 U. S. 563, 568. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering* v. *Board of Education*, *supra*, with *Shelton* v. *Tucker*, *supra*.

Thus the respondent's lack of a contractual or tenure "right" to re-employment for the 1969–1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exer-

cise of First and Fourteenth Amendment rights. *Shelton* v. *Tucker, supra; Keyshian* v. *Board of Regents, supra.* We reaffirm those holdings here.

In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the Board of Regents' action was invalid.

But we agree with the Court of Appeals that there is a genuine dispute as to "whether the college refused to renew the teaching contract on an impermissible basis—as a reprisal for the exercise of constitutionally protected rights." 430 F. 2d, at 943. The respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that this public criticism was within the First and Fourteenth Amendment's protection of freedom of speech. Plainly, these allegations present a *bona fide* constitutional claim. For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. *Pickering* v. *Board of Education, supra.*

For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper.

II

The respondent's lack of formal contractual or tenure security in continued employment at Odessa Junior Col-

lege, though irrelevant to his free speech claim, is highly relevant to his procedural due process claim. But it may not be entirely dispositive.

We have held today in *Board of Regents* v. *Roth, ante,* that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor.

Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth,* the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty.[5] Nor did it amount to a showing of a loss of property.

But the respondent's allegations—which we must construe most favorably to the respondent at this stage of the litigation—do raise a genuine issue as to his interest in continued employment at Odessa Junior College. He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. In particular, the respondent alleged that the college had a *de facto* tenure program, and that he had tenure

---

[5] The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. 430 F. 2d, at 944. We have rejected this approach in *Board of Regents* v. *Roth, ante,* at — n. 14.

under that program. He claimed that he and others legitimately relied upon an unusual provision that had been in the college's official Faculty Guide for many years:

> "*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.[6]

---

[6] The relevant portion of the guidelines, adopted as "Policy Paper 1" by the Coordinating Board on October 16, 1967, reads:

"A. Tenure

"Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.

"A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:

"(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years (even though thereby the person's total

Thus the respondent offered to prove that a teacher, with his long period of service, at this particular State College had no less a "property" interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him.

We have made clear in *Roth, ante*, at ——, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Id.*, at ——. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*

A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized

---

probationary period in the academic profession is extended beyond the normal maxmium of seven years).

"(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities."

The respondent alleges that, because he has been employed as a "full-time instructor" or professor within the Texas College and University System for 10 years, he should have "tenure" under these provisions.

in writing, may be "implied." 3 Corbin on Contracts, §§ 561–672A. Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See Byse & Joughin, Tenure in American Higher Education 17–28.[7]

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "suf-

[7] We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as State law . . . ." *Board of Regents* v. *Roth*, *ante*, at —. If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

ficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." 430 F. 2d, at 943. Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.

Therefore, while we do not wholly agree with the opinion of the Court of Appeals, its judgment remanding this this case to the District Court is

Affirmed.

MR. JUSTICE POWELL took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 70–36 & 71–162

Charles R. Perry et al., Petitioners, v. Robert P. Sindermann, etc. (70–36)	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
The Board of Regents of State Colleges et al., Petitioners, v. David F. Roth, etc. (71–162)	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 29, 1972]

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the Court's judgments and opinions in *Perry* and *Roth*, but there is one central point in both decisions that I would like to underscore since it may have been obscured in the comprehensive discussion of the cases. That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract. Thus whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law. The Court's opinion makes this point very sharply:

> "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as

state law . . . ." *Board of Regents* v. *Roth, ante,* at pp. 12–13.

Because the availability of the Fourteenth Amendment right to a prior administrative hearing turns in each case on a question of state law, the issue of abstention will arise in future cases contesting whether a particular teacher is entitled to a hearing prior to nonrenewal of his contract. If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law.

SUPREME COURT OF THE UNITED STATES

Nos. 70–36 & 71–162

Charles R. Perry et al., Petitioners; 70–36 *v.* Robert P. Sindermann, etc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
The Board of Regents of State Colleges et al., Petitioners, 71–162 *v.* David F. Roth, etc.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 29, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting in No. 71–162 and dissenting in part in No. 70–36.

Although I agree with Part I of the Court's opinion in No. 70–36, I also agree with my Brother MARSHALL that "respondent[s] [were] denied due process when [their] contract[s] [were] not renewed and [they were] not informed of the reasons and given an opportunity to respond." *Post*, at —. Since respondents were entitled to summary judgment on that issue, I would affirm the judgment of the Court of Appeals in No. 71–162, and, to the extent indicated by my Brother MARSHALL, I would modify the judgment of the Court of Appeals in No. 70–36.

SUPREME COURT OF THE UNITED STATES

No. 70–36

Charles R. Perry et al., Petitioners, v. Robert P. Sindermann, etc. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 29, 1972]

MR. JUSTICE MARSHALL, dissenting in part.

Respondent was a teacher in the state college system of the State of Texas for a decade before the Board of Regents of Odessa Junior College decided not to renew his contract. He brought this suit in Federal District Court claiming that the decision not to rehire him was retaliation for his public criticism of the policies of the college administration in violation of the First Amendment, and that because the decision was made without giving him a statement of reasons and a hearing, it denied him the due process of law guaranteed by the Fourteenth Amendment. The District Court granted summary judgment for petitioners, but the Court of Appeals reversed and remanded the case for further proceedings. This Court affirms the judgment of the Court of Appeals.

I agree with Part I of the Court's opinion holding that respondent has presented a bona fide First Amendment claim that should be considered fully by the District Court. But, for the reasons stated in my dissenting opinion in *Board of Regents* v. *Roth*, No. 71–162, *ante*, at —, I would modify the judgment of the Court of Appeals to direct the District Court to enter summary judgment for respondent entitling him to a statement of reasons why his contract was not renewed and a hearing on disputed issues of fact.